(11)

No. 91-538-CFX
Status: GRANTED

Title: Forsyth County, Georgia, Petitioner
v.
The Nationalist Movement

Docketed:
September 27, 1991

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Stubbs III,Robert S.

Counsel for respondent: Barrett,Richard

100491 counsel advised petr shld be as above

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Sep 27 1991 | G | Petition for writ of certiorari filed. |
| 2 | Oct 30 1991 | | DISTRIBUTED. November 15, 1991 |
| 3 | Nov 5 1991 | P | Response requested -- JPS. (Due December 5, 1991) |
| 4 | Dec 5 1991 | | Brief of respondent Nationalist Movement in opposition filed. |
| 5 | Dec 11 1991 | | REDISTRIBUTED. January 10, 1992 |
| 7 | Jan 10 1992 | | Petition GRANTED. Petitioners brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 5, 1992. Reply briefs are to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992. |
| | | | ********** |
| 13 | Feb 5 1992 | | SET FOR ARGUMENT TUESDAY, MARCH 31, 1992. (1ST CASE). |
| 9 | Feb 12 1992 | G | Motion of International Association of Chiefs of Police, et al. for leave to file a brief as amici curiae filed. |
| 8 | Feb 14 1992 | | Brief of petitioner Forsyth County, Georgia filed. |
| 10 | Feb 14 1992 | | Joint appendix filed. |
| 11 | Feb 18 1992 | | Record filed. |
| | | * | Certified original record U.S. Court of Appeals, Eleventh Circuit and U.S. Dist. Court, N.Dis.Georgia (1 BOX) |
| 12 | Feb 21 1992 | | CIRCULATED. |
| 17 | Feb 27 1992 | X | Brief of respondent Nationalist Movement filed. |
| 16 | Mar 4 1992 | G | Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed. |
| 14 | Mar 5 1992 | G | Motion of Public Citizen for leave to file a brief as amicus curiae filed. |
| 15 | Mar 5 1992 | X | Brief amicus curiae of AFL-CIO filed. |
| 19 | Mar 23 1992 | | Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED. |
| 20 | Mar 23 1992 | | Motion of Public Citizen for leave to file a brief as amicus curiae GRANTED. |
| 21 | Mar 24 1992 | X | Reply brief of petitioner Forsyth County, GA filed. |
| 22 | Mar 30 1992 | | Motion of International Association of Chiefs of Police, et al. for leave to file a brief as amici curiae GRANTED. |

2 pp

No. 91-538-CFX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 23 | Mar 30 1992 | | ARGUED. |

91-588

No. _____



In The

# Supreme Court of the United States

October Term, 1991

FORSYTH COUNTY, GEORGIA,

*Petitioner,*

vs.

THE NATIONALIST MOVEMENT,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

McVay & Stubbs

Robert S. Stubbs III
*Attorney for Petitioner*
Forsyth County, Georgia
Georiga Bar No. 689820

Forsyth Professional Bldg.
Suite 200, 110 Old Buford Rd.
Cumming, Georgia 30130

(404) 889-6045

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Whether the provisions of the First Amendment to the United States Constitution limit the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum or whether the amount of the license fee may take into account the actual expense incident to the administration of the ordinance and the maintenance of public order in the matter licensed, up to the sum of $1,000.00 per day of the activity.

TABLE OF CONTENTS





TABLE OF AUTHORITIES

## REFERENCES TO OPINIONS IN COURTS BELOW

Nationalist Movement v. City of Cumming, Forsyth County, Georgia, and Forsyth County Board of Education, 913 F.2d 885, *vacated*, 921 F.2d 1125 (1990), *reinstated*, 934 F.2d 1482 (11th Cir. 1991) (en banc)

Nationalist Movement v. City of Cumming, Forsyth County, Georgia, and Forsyth County Board of Education, C.A. File No. 2:89-CV-06-WCO (D.C.N.D.Ga., January 23, 1989)

## STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction is invoked pursuant to the provisions of Title 28 United States Code, Section 1254(1), as Petitioner is a party to a civil case where an adverse judgment was rendered by the United States Court of Appeals for the Eleventh Circuit on July 5, 1991.

## CONSTITUTIONAL PROVISIONS AND LOCAL ORDINANCES

Amendment I to the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 3, subsection (6) of Forsyth County Ordinance No. 34:

Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed. In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax.

The full text is attached as a part of the Appendix *H*.

## STATEMENT OF THE CASE

### 1. Course of Proceedings and Disposition Below.

On January 19, 1989, Respondent Nationalist Movement filed suit in the United States District Court, Northern District of Georgia, Gainesville Division, against Forsyth County, Georgia, seeking a temporary restraining order enjoining Forsyth County from interfering with Respondent's plans to conduct a rally on the courthouse grounds in Cumming, Forsyth County, Georgia, on January 21, 1989. R-1-1. Respondent requested a declaratory judgment that the Forsyth County ordinance regulating parades was unconstitutional because it charged an administrative permit fee to all non-profit corporations desiring to parade and rally in the County. R-1-1. Jurisdiction in the district court was grounded upon Title 28 United States Code, sections 1331, 1343, 2201, and 2202.



The Court heard oral argument on the merits in a hearing conducted on January 19, 1989. R-3.

On January 23, 1989, the district court entered an Order finding that the Forsyth County ordinance was not unconstitutional on its face or as applied and thus denied Respondent's petition for a temporary restraining order. R-1-7; Appendix A.

Respondent noted its appeal on May 17, 1989. R-2-22.

On October 2, 1990, a panel of the United States Court of Appeals for the Eleventh Circuit held Forsyth County's Ordinance 34 facially unconstitutional on the basis that it permits a charge of up to $1,000.00 for a permit for activities covered by the Ordinance and that that sum "exceeds the constitutional requirement that such a charge be at most nominal." *Nationalist Movement v. City of Cumming, et al.*, 913 F.2d 885, 891 (11th Cir. 1990); Appendix B at 31.

Forsyth County filed its Suggestion of Rehearing En Banc on October 22, 1990, which was granted by the Court of Appeals on December 18, 1990, which action vacated the panel decision. *Nationalist Movement v. City of Cumming, et al.*, 921 F.2d 1125 (11th Cir. 1990); Appendix C. On July 5, 1991, the en banc Court of Appeals reinstated the Panel decision. *Nationalist Movement v. City of Cumming, et al.*, 934 F.2d 1482 (11th Cir. 1991); Appendix D.

### 2. Statement of Facts.

On January 17, 1987, Hosea Williams, an Atlanta civil rights personality, led a small march in Forsyth County,

Georgia. Appendix E (Atlanta Journal & Constitution, (hereinafter, Atl. J & C) January 18, 1987). That march was halted by protestors throwing rocks and bottles. *Id.* On January 24, 1987, Mr. Williams returned to Forsyth County with approximately 20,000 marchers who were greeted by approximately 1,200 counterdemonstrators. Appendix F (Atl. J & C, Jan. 25, 1987). Extraordinary expenses shared by state and local law enforcement officers approximated $679,148.00 for the second march. Appendix G (Atl. J & C, Feb. 4, 1987).

On January 27, 1987, the Forsyth County Board of Commissioners (hereinafter "Board") enacted Ordinance 34 "to provide for the issuance of permits for parades, assemblies, demonstrations, road closing, [etc.]" Appendix H, pp. 98-111 (FC Ex. 1). Ordinance 34 was duly amended February 23, 1987 (*Id.* at 112-116), June 8, 1987, (*Id.* at 117-123) and April 25, 1988[1] (*Id.* at 124-126). Among the findings by the Board was that "the cost of necessary and reasonable protection of persons participating in or observing said [activities] exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible." Appendix H at 100.

The Board further found that "the cost of additional protection [could] be estimated by the County Administrator . . . and any surplus [paid] refunded to those sponsoring the [activity]." *Id.* At the time of the Board's second amendment to Ordinance 34, on June 8, 1987, the

[1] The final amendment reflects a date of April 25, 1987, which is a typographical error since the amendment refers to an earlier amendment of June 8, 1987.



Board found that "serious constitutional objections have been raised to Ordinance Number 34, specifically the fee aspects . . . "[2] *Id.* at 118. That amendment included a change to section 3 of the ordinance in that a new subsection (6) was inserted authorizing an advance permit fee of

> not more than $1,000.00 for each day such [activity] shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed. In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax.[3]

*Id.* at 119.

In the meantime, as a result of an order by Honorable William C. Kelley, in the case of *Forsyth County Defense League v. Forsyth County*, C.A. No. C-87-31G (N.D.Ga. 1987) (Appendix I) a subsidiary of Respondent, the Forsyth County Defense League, Appendices J & K, had staged a rally upon the Forsyth County Courthouse grounds on March 14, 1987. Appendix L (Atl. J & C, March 15, 1987).

On January 16, 1988, Hosea Williams returned to Forsyth County. Appendix M (Atl. J & C, Jan. 17, 1988).

[2] The constitutional objection was recognition of the case of Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

[3] The language of the amendment was lifted from the opinion in Cox v. New Hampshire, 312 U.S. 569, 577 (1941).

On January 23, 1988, Richard Barrett, Respondent's attorney, led another rally and march in Forsyth County. Appendix N (Atl. J & C, Jan. 24, 1988)

In 1989, Forsyth County was spared from further marches, etc. by the litigation now before the Court. Respondent had been issued a permit contingent upon payment of a $100.00 fee. R-3-134; R-1-7-13. The fee was determined by a calculation of the time spent by the Forsyth County Administrator, Donald Major, processing Respondent's application for a permit. R-3-135-138, 158; R-17-14-15; Appendix O (FC Ex. 2). The fee was not paid and no assembly on courthouse grounds occurred as requested in January, 1989. R-3-138.

During various periods in 1987, the Forsyth County Defense League, a subsidiary of Appellant, was permitted use of a meeting room in the County courthouse for its regular meetings. Appendices J, P, Q, R, T, U, V & W. It has also had other meetings and rallies on private property in Forsyth County. Appendices P, S, & U.

## ARGUMENT

### I. THIS COURT'S DECISIONS IN COX V. NEW HAMPSHIRE, 312 U.S. 569 (1941) AND MURDOCK V. PENNSYLVANIA, 319 U.S. 105 (1943), DO NOT LIMIT LICENSE FEES DEFRAYING ADMINISTRATIVE AND MAINTENANCE OF PUBLIC ORDER COSTS TO A "NOMINAL" SUM.

Counties and municipalities face numerous requests for permission to use public property for uses ranging from celebratory (patriotic parades), to commercial



(handbill distribution), to religious (Macy's Christmas parade), to athletic (Boston marathon), to political - both traditional and protestant (campaign parades and civil rights protests). All of these requests involve administrative effort and maintenance of public order. The issue in this case is whether applicants for such uses are entitled to local government subsidies of the administrative and public order costs associated with the requested activities, even when, as here, they do not contribute taxes to the government providing the subsidy. The Court of Appeals found an ordinance imposing more than a nominal charge facially unconstitutional. Petitioner requests that this Court correct this uncalled for departure from established constitutional precedent and allow local government in Alabama, Georgia and Florida to regain control of their administrative and public safety budgets as they respond to requests for use of public property at public expense.

In 1941 this Court reviewed a New Hampshire public law which prohibited the performance or exhibition of theatrical or dramatic representations, parades or processions upon any public streets or ways, or open air public meetings upon any ground abutting thereon without a special license. The fees for the license were to be paid in advance in a sum not more than $300.00 for each day a performance, exhibition, procession or open air public meeting was to take place. *Cox v. New Hampshire*, 312 U.S. 569, 571 (1941). The case came to this Court as a criminal case because the marchers in the City of Manchester, New Hampshire on July 8, 1939, did not apply for a permit and none was issued. *Id.* at 572. This Court affirmed the Supreme Court of New Hampshire which affirmed the

convictions by saying that "[t]here is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated." *Id.* at 577. The purpose stated by the Supreme Court of New Hampshire was to "meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Id.* This Court went on to say that "we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought." *Id.*

In beginning the discussion of the fee this Court said

> There remains the question of license fees which, as the Court said, had a permissible range from $300.00 to a "nominal" amount.

*Id.* at 576. From this statement this Court certainly appeared to say that $300.00 was not a nominal amount in 1941.

In 1943, this Court issued its decision in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943). That case dealt with a City of Jeannette, Pennsylvania, ordinance which provided that persons canvasing or soliciting within a borough, were required to procure a license in an amount represented by a sliding scale determined by the number of days or weeks the solicitations were to occur. In striking down the ordinance this Court found a multitude of problems such as the First Amendment prohibition against preventing distribution of hand bills in pursuit of a clearly religious activity, the First Amendment prohibition of taxation on the exercise of a constitutional right and that a flat fee not calculated to defray the



expense of protecting those on the streets and at home against the abuse of solicitors was demanded. *Id.* In reversing the convictions this Court stated:

> and the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against abuses of solicitors. See *Cox v. New Hampshire, supra,* 312 U.S. at 576, 577. . . .

*Murdock, supra* at 116.

From this quotation the Court of Appeals below has fashioned, as the law of the Eleventh Circuit, a rule that if a municipality charges fees for the use of the public streets then such fees must be both nominal and related to the expenses incidental to the policing of the event. *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (11th Cir. 1985), *cert. denied* 475 U.S. 1120 (1986). That holding by a split panel of the Eleventh Circuit has now been confirmed en banc in this case. *Nationalist Movement v. City of Cumming, et al.*, 913 F.2d 885, *vacated* 921 F.2d 1125 (1990), *reinstated*, 934 F.2d 1482 (11th Cir. 1991) (en banc).

When the Court of Appeals' pronouncement occurred, in the *Central Florida* case, the Court stated that

> [t]he Supreme Court has not heard a First Amendment service charge case since *Murdock* in 1943 and as a consequence, there has been no further guidance by the Court on the application of the *Cox* rationale to the modern free speech cases.

*Central Florida*, 774 F.2d at 1522.

Three of the circuit judges dissented in the case below on the issue of whether only nominal charges are constitutionally authorized for the use of city streets and parks in connection with parades and rallies in furtherance of First Amendment activities. 934 F.2d at 1493. Additionally, one circuit judge dissented from the *Central Florida* panel decision for the same reason. 774 F.2d at 1527.

As pointed out by the majority in the *Central Florida* case, this Court has provided no guidance as to the continued vitality of *Cox* to the problems faced by local government in controlling expensive exercises of First Amendment rights and protecting those invoking those rights in almost fifty years. The Court of Appeals below has restricted local government in three states to nominal charges for the exercise of expensive duties of protection, administration and control of ever escalating demonstrations by the citizenry. Such a position is unfair to local government and dangerous to the citizens which local government is obliged to protect and govern. *Cox, supra* at 574. The complete indifference the Court of Appeals has shown to the financial pressures being brought to bear on local government from those wishing to express their views in massive rallies and demonstrations is cause for great concern by local government in the affected states and serves as a valid reason for this Court to provide direction in what has become an ever increasing fiscal and security problem for local government.

The Court of Appeals below has, in this case and in the *Central Florida* case in 1985, restricted without reason and contrary to the holding of this Court in *Cox* the



ability of local government to defray its costs of administering and policing use of its streets and property by those wishing to express their First Amendment views. Taken to its logical extreme, the financial burden cast upon local government to protect both those expressing their views and those in the audience may one day result in a breakdown in that protection with the result that government is simply unable to provide a safe atmosphere for the expression of First Amendment views. *Cox, supra* at 574. As most suitably put by Judge Henderson, dissenting in *Central Florida,*

> [a]lthough it would be a laudable gesture for local governments to subsidize the free expression of speech, it is not required by the Constitution.

*Central Florida*, 774 F.2d at 1529.

The Court of Appeals' decisions below and in the *Central Florida* case in 1985, also fail to consider new pronouncements by this Court concerning governmental regulation in time, place, or manner cases.

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." [citations omitted]

. . .

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of a disagreement with the message it conveys. [citation omitted] The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [citation omitted] Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech." [citations omitted]

*Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 2753-2754 (1989). Additionally, petitioner has shown the Court of Appeals a significant governmental interest in the fee aspects of the ordinance, that is, defraying of proven expensive costs of administration of the ordinance and protection of citizens, Appendix H at 100, 119, and respondent has had ample opportunity to express its message in alternative places and at alternative times. Appendices J, P-W. The Court of Appeals simply refused to invoke those considerations most recently enunciated by this Court in *Ward v. Rock Against Racism, supra*, in determining whether the Forsyth County Ordinance was consistent with the provisions of the First Amendment.

Therefore, the Court of Appeals below has failed to adhere to the prior decisions of this Court, thus justifying this Court's acceptance of jurisdiction for the purpose of maintaining adherence to accepted precedent.



## II. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DISAGREES WITH THE COURTS OF APPEALS FOR THE NINTH CIRCUIT AND THE SIXTH CIRCUIT AS TO WHETHER THIS COURT'S DECISIONS IN COX V. NEW HAMPSHIRE, 312 U.S. 569 (1941) AND MURDOCK V. PENNSYLVANIA, 319 U.S. 105 (1943) LIMIT CHARGES FOR USE OF A PUBLIC FORUM TO "NOMINAL" CHARGES.

As stated by Judge Fay, concurring in the original panel decision below, the Court of Appeals for the Ninth Circuit has recognized that "it does not violate the First Amendment for a public entity to collect charges that fairly reflect costs incurred by the municipality in connection with an activity involving expression." *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1081 (9th Cir.), *cert. denied*, 110 S.Ct. 2590 (1990). That Court also noted that the language this Court used in the *Murdock* case "is not a statement that *only* nominal charges to defray expenses are constitutionally permissible." *Id.*

Even more recently, in a case in which certiorari has been requested in this Court, the Court of Appeals for the Sixth Circuit has rejected the Eleventh Circuit approach in *Central Florida, supra*, and upheld the constitutionality of an ordinance requiring payment of an $85.00 administrative filing fee and a traffic control cost assessed by the Director of Public Safety. *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), *cert. applied for*, Docket No. 91-205.

Therefore, this Court should also hear this case to decide the conflict between the Court of Appeals for the Eleventh and Sixth and Ninth Circuits which have read

this Court's pronouncements in *Cox* and *Murdock* in irreconcilable ways.

## CONCLUSION

For the reasons stated, maintaining established precedent which protects the public fisc and erasing the disarray between the Courts of Appeal addressing this constitutional question, Petitioner respectfully requests that this Court issue a Writ of Certiorari and hear this case.

Respectfully submitted this 26th day of September, 1991.

McVay & Stubbs

Robert S. Stubbs III
*Attorney for Petitioner*
Forsyth County, Georgia
Georgia Bar No. 689820



## APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

| | | |
|---|---|---|
| THE NATIONALIST MOVEMENT, a Mississippi non-profit corporation incorporated in Georgia | : | 2:89-CV-06-WCO |
| VERSUS | : | (Filed Jan. 23, 1989) |
| CITY OF CUMMING, GEORGIA; FORSYTH COUNTY, GEORGIA; and FORSYTH COUNTY BOARD OF EDUCATION | : | |

ORDER

The Nationalist Movement filed this action on January 19, 1989, for the purpose of obtaining a temporary restraining order and permanent injunction prohibiting the defendants from interfering with plaintiff's plans to hold a parade and rally in the City of Cumming, Forsyth County, Georgia on January 21, 1989. On January 19, 1989, the parties appeared before the court for a hearing on (1) the application of attorney Richard Barrett to appear before the court *pro hac vice*, (2) on the plaintiff's application for leave to proceed *in forma pauperis*, and (3) on the merits of the action.

Application to Proceed Pro Hac Vice

After hearing argument of counsel, the court orally granted the application of attorney Richard Barrett to proceed *pro hac vice*. Due to certain matters which

occurred during the course of the trial, the court reconsidered its decision, but reluctantly allowed Barrett to complete the hearing so that the emergency matter could be heard without further delay. However, the court announced that, due to his actions, Barrett would not again be allowed to proceed *pro hac vice* before this court. Consequently, the court feels that it is appropriate to set forth in some detail the reasons for the court's ruling.

Plaintiff, the Nationalist Movement, is a non-profit corporation chartered in Mississippi with its principal office located in Jackson, Mississippi. Plaintiff is licensed to do business in Georgia. Plaintiff's attorney, Richard Barrett, is licensed to practice law in the state of Mississippi and states on his application that he is a member of the bar of the United States Supreme Court.

In 1987, Barrett was granted permission to practice *pro hac vice* before this same court in a similar case. *See Forsyth County Defense League v. City of Cumming*, No. 2:87-CV-31. Upon inquiry, the court learned that Barrett has also practiced in a *pro hac vice* status on two other occasions in the Northern District of Georgia. Thus, the court learned that Barrett has been granted leave to appear *pro hac vice* on at least three occasions within the last two years. In addition, Barrett has represented himself in yet another action which is on appeal to the Eleventh Circuit Court of Appeals.

The court expressed serious concerns that Barrett is regularly practicing law in the courts of Georgia and is abusing this Court's Local Rules allowing attorneys to appear *pro hac vice*. In response to these concerns, Barrett informed the court that he has applied for admission to



the Georgia bar and was allowed to take the bar exam; however, the "Fitness Board" has not certified him for admission and the Office of Bar Admissions has not released the results of his examination. The court asked Barrett if he knew why his certification process was taking so long or why the bar had not yet certified him fit to practice law and Barrett said "no"; he had no idea whatsoever. The court finds that such a response is entirely inconsistent with the Bar's own rules and commonly accepted principles of due process. If the Georgia Bar questions Barrett's fitness to practice law, then this court would certainly share that concern.

Local Rule 110-2 provides that non-resident attorneys who are active members of the bar of the Supreme Court or the highest court of a state may be permitted to appear *pro hac vice*. "*Pro hac vice*" means "for this turn" or "for this one particular occasion." Black's Law Dictionary, 5th ed. 1979. The decision whether *pro hac vice* status should be granted *or* revoked is within the sound discretion of the district court. *D.H. Overmyer Co. Inc. v. Robson*, 750 F.2d 31, 33 (6th Cir. 1984). *Pro hac vice* is a privilege and is not intended to be used as a subterfuge to avoid admission to the bar of this court.

Moreover, a court may revoke *pro hac vice* status or deny such status in future cases if the court observes unethical or illegal conduct by the attorney. *United States v. Dinitz*, 538 F.2d 1214, 1223-24 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977). In the instant case, the court finds that attorney Barrett attempted to deceive the court be eliciting false or improper testimony from his witness. While Barrett was given an opportunity to respond, the

court finds that his explanation for his conduct was unsatisfactory.

Attorney Barrett called Dennis Wheeler as the plaintiff's first witness. Since one of the issues in the case was whether the plaintiff organization had the funds to pay the fee imposed by the city, Wheeler was called as an officer of the organization to testify as to the financial assets of plaintiff and to authenticate certain business records.

On direct examination, Wheeler testified that he was the "acting" secretary of the organization, that he had reviewed the corporation's financial affidavit, and that the affidavit accurately reflected the organization's financial situation. Wheeler also testified that he had reviewed Plaintiff's exhibit No. 1, which consisted largely of correspondence between the parties, and that these documents were maintained in the normal course of the plaintiff's business.

Wheeler also testified as to the goals of the movement, the reasons why they wished to hold a parade and rally, and that the plaintiff had never been charged a fee by other counties or municipalities. Barrett also elicited testimony from Wheeler about events that took place at a city council meeting in the City of Cumming. Wheeler qualified his answer in several instances by stating that his response was "to the best of his knowledge."

Barrett then moved for admission of the documents and the financial affidavit. The defendants objected and began to cross-examine Wheeler. On cross-examination it was revealed that Wheeler had been appointed "acting"



secretary by Barrett only a few hours prior to his testimony. Wheeler had no knowledge of the plaintiff's corporate organization or by-laws. Wheeler admitted that he is not the custodian of the plaintiff's records, that he believes that they are kept in Jackson, Mississippi, and that other than the documents Barrett had provided him that morning, he had never examined the books and records of plaintiff. Wheeler admitted that he had no personal knowledge of the financial status of plaintiff and has never seen any bank statements. Wheeler also admitted that he had never attended a Cumming city council meeting and that he had received all his information from Barrett.

Defendants moved to strike Wheeler's testimony in its entirety and after hearing from Barrett, the court granted the motion. On the record, the court expressed serious concern as to whether the attorney had attempted to commit a fraud upon the court. The court noted then and reiterates now that Wheeler, the witness, attempted to avoid committing perjury by qualifying his answers and when questioned on cross-examination, freely admitted that he had no personal knowledge of the majority of the matters he had been asked about on direct examination. Therefore, the court does not find that there was any intentional wrongdoing on the part of Mr. Wheeler.

Canon 7 of the Georgia Code of Professional Responsibility provides that "A lawyer should represent a client zealously within the Bounds of the Law." However, while an attorney should be "zealous", the disciplinary rules provide that a lawyer shall not "knowingly use perjured testimony" or "counsel or assist his client in conduct that

the lawyer knows to be illegal or fraudulent." Disciplinary Rules 7-102(4) and (7).

In the instant case, counsel knowingly called a witness to the witness stand and represented, or at least intentionally led the court and parties to believe, that the witness was a regular officer of the corporation when in fact the witness was not. In essence, the attorney "manufactured" or "created" the witness that very morning by appointing him to the office of "acting" secretary of the corporation. The court finds that the attorney was attempting to perpetrate a fraud upon the court by these actions.

In addition, the attorney came dangerously close to procuring perjured testimony by asking his own witness about events and documents of which the witness had no actual knowledge when the *attorney clearly knew that the witness did not possess such knowledge*. Explanations of lack of time or funds to produce the proper witnesses do not excuse such conduct.

When defense counsel attempted to elicit the truth about the above matter, Attorney Barrett persisted in making frivolous objections based upon the attorney/client privilege. However, counsel for defendant City of Cumming obtained a certified copy of records from the Secretary of State's office showing that Barrett is the Chief Executive Officer of the Nationalist Movement. *See* City of Cumming Exhibit No. 1. Moreover, another exhibit shows that it is Barrett who seeks to make a speech at the rally in Forsyth County. *See* Exhibit 1, *City of Cumming Response to Motion for Temporary Restraining*



*Order*. Thus, Barrett is actually representing his own personal interests and it is unethical for him to try to shield the discovery of the true facts by use of the attorney/client privilege.

And finally, the court finds that Barrett violated Disciplinary Rule 7-102(1) which prohibits an attorney from taking an action on behalf of his client when he knows that it would serve merely to harass or maliciously injure another. In conjunction with this rule, Ethical Consideration 7-25 provides that the attorney should not ask a witness a question solely for the purpose of embarrassing him.

In the instant case, Barrett asked one defense witness whether he was a veteran. This question was irrelevant and impertinent and the witnesses' negative response was later used by Barrett to begin an improper closing argument. This argument was designed to inflame the trier of fact and to embarrass and cast disparagement upon the witness and other individuals similarly situated. Such conduct by an attorney will not be tolerated by this court.

Accordingly, attorney Barrett is hereby on notice that the court will not grant any future applications to appear *pro hac vice* due to the misconduct which occurred during the hearing in this action.

Application for Leave to Proceed in forma pauperis

The second matter heard before the court was the application of the plaintiff for leave to proceed *in forma pauperis*. This court denied the application on the grounds

that plaintiff is a corporation and corporations may not proceed *in forma pauperis* under 28 U.S.C § 1915.

As noted above, the Nationalist Movement is incorporated under the laws of Mississippi as a non-profit charitable corporation. According to the affidavit submitted in support of the application, the plaintiff is qualified to do business in Georgia and is incorporated in Georgia as a non-profit charitable corporation. The affidavit states that the corporate bank account contains the sum of $90.59 and the only assets of the corporation are some flags, supplies and printed matter which are of nominal value.

Section 1915(a) permits the court to authorize "a person" to commence an action without prepayment of fees and costs if the person makes an affidavit that he is unable to pay such costs. The question is whether or not plaintiff is "a person" for purposes of section 1915(a).

The Eleventh Circuit has not yet addressed this issue; however, the Fifth Circuit recently was confronted with the issue in *FDM Manuf. Co. v. Scottsdale Ins. Co.*, 855 F.2d 213 (5th Cir. 1988). The Fifth Circuit traced the legislative history of Section 1915(a) and concluded that Congress did not intend to include corporations within the reach of the statute. *Id.* at 214.

The original version of section 1915 used the term "citizen" rather than "person." Previous courts, including the former Fifth Circuit, have held that a corporation was not a "citizen". *See Atlantic S.S. Corp. v. Kelley*, 79 F.2d 339, 340 (5th Cir. 1935)(denial of *in forma pauperis* status for corporation on appeal). However, in 1959, Congress amended the statute and changed only the one word. As



noted in *FDM Manufacturing*, the legislative history indicates that the only reason for the change was to include aliens within the reach of the statute.

While generally, the term "person" is construed to include corporations, the legislative history in this case leads the court to conclude that Congress did not intend to permit indigent corporations to proceed *in forma pauperis*. The majority of other courts which have addressed this issue share this view. *See Sears Roebuck & Co. v. C. W. Sears Real Estate Inc.*, 686 F.Supp. 385 (N.D.N.Y. 1988); *Move Organization v. United States Dept. of Justice*, 555 F.Supp. 684, 690-92 (E.D. Pa. 1983); *Honolulu Lumber Co. v. American Factors, Ltd.*, 265 F.Supp. 578 (D. Haw 1966) *aff'd on other grounds*, 403 F.2d 49 (9th Cir. 1968).

Plaintiff relies upon the unpublished opinion in *The Nationalist Movement v. City of Natchez, Mississippi*, No. W880033(B), S.D.Miss., June 30, 1988. The order cited by plaintiff deals largely with the issue of attorneys fees and mentions *in forma pauperis* status only in passing. During the course of that action, a magistrate granted the plaintiff's motion to proceed *in forma pauperis* and plaintiff attempted to recover attorney's fees for prevailing on that issue. Defendants objected, claiming that the magistrate's decision was in error. The district judge simply noted that it was not clear that the magistrate had erred and, in any event, the defendants had not objected to the magistrate's decision within ten days.

The *Natchez* decision contained no discussion of the *FDM Manufacturing* case. Thus, this court presumes that the decision was not brought to the district court's attention, for if it had been, the district court would have been

bound by it. In any event, the Mississippi court did not address the issue since the parties had not filed timely objections to the magistrate's order.

Plaintiff also relies upon *Allen Russell Publishing, Inc. v. Levy*, 109 F.R.D. 315 (N.D.Ill. 1985). In that case, however, there was no request by the corporation to proceed *in forma pauperis* and the court merely mentioned in passing that it did not know how it would rule if it had been confronted with the issue. Thus, the case has no precedential value.

Finally, plaintiff refers the court to *Harlem Rivers Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 71 F.R.D. 93 (S.D.N.Y. 1976), where the court allowed the non-profit corporation to proceed as a pauper. In *Harlem River*, however, the court found that the suit was an action brought "in the public interest", that the shareholders would not reap any personal financial benefit from the action, and that the shareholders or members were themselves indigent persons. Thus, the court noted that even if the corporate veil was pierced, the members would have met the statutory requirement of poverty.

The *Harlem Rivers* factors have not been shown to be present in the instant suit. More importantly, this court agrees with the majority of courts which have considered the issue and finds that Congress intended that only natural persons would be included within the reach of the statute. Accordingly, this court denied the application for leave to proceed *in forma pauperis*.[1]

---

[1] After the court's ruling, counsel for plaintiff paid the filing fee, however, counsel indicated that he was paying the same under "protest."



City of Cumming Ordinance

Plaintiff originally applied for a permit to use the streets and roads of Cumming for a parade on the afternoon of January 21, 1989. The city granted the original request on the condition that the organization only use one lane of the two lane road, that the parade last no more than one hour, and that the participants keep moving and not stop on the streets around the courthouse square. Subsequently, plaintiff filed an "amended" application asking to march in the morning instead of the afternoon. The city denied this request based upon the city ordinance provision prohibiting parades on Saturday mornings.

Plaintiff contends that this is a blanket prohibition on parades; however, this court ruled that the ordinance is not an absolute prohibition, but merely regulates the time and manner of the activity. Moreover, there is absolutely no evidence that the regulation, which is content-neutral, is not applied evenhandedly to all groups. Accordingly, as is more fully set forth on the record, the court finds that the ordinance is reasonable, serves significant governmental interests, and does not unduly burden plaintiff's exercise of its, or its members', First Amendment rights.

Forsyth County Ordinance

The plaintiff also challenges the County's parade ordinance as constitutionally invalid on its face. At the outset, the court notes that a statute may be invalid on its face if it is " 'unconstitutional in every conceivable application,' or it 'seeks to prohibit such a broad range of

protected conduct' that it is 'overbroad.' " *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984)). Furthermore, a statute is "overbroad" for constitutional purposes when there is a realistic danger that it will significantly compromise recognized First Amendment protections of parties not before the court. *Id.* Furthermore, a statute may be overbroad if its terms are so sweeping that they create an unnecessary risk of chilling protected speech. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984).

Pursuant to the county ordinance, Forsyth County imposed a $100 fee upon the plaintiff as a condition of receiving a permit for the January 21, 1989 parade. Sections 3(6) of this ordinance provides as follows:

> (6) Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place. *The Administrator shall adjust the amount paid in order to meet the expense incident to the Administration of the Ordinance and to the maintenance of public order in the matter licensed.* In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax. (emphasis added)

Restraints against free speech in traditional public forums are proper only when they are valid time, place and manner restrictions which are content neutral, narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication. *United States v. Grace*, 461 U.S. 171 (1983). On the



issue of whether permit fees impose an unconstitutional burden, the Supreme Court in *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941), reasoned that such charges, as distinguished from taxes, can be appropriate when carefully set to meet the costs incident to processing the application and maintaining public order at the assembly.

This Circuit, however, has subsequently construed *Cox* to preclude the levying of charges for the cost of additional policemen occasioned by a demonstration. *See Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986). The ordinance in *Walsh* vested unfettered discretion in the chief of police to determine the additional police force which might be necessary to protect public order. *Id.* Concluding that the potential for content-based discrimination was inevitable, the Walsh court struck the ordinance as facially unconstitutional. *Id.* at 1526.

The undisputed facts developed at the hearing reveal that Donald Major, the Forsyth County Administrator with authority to grant parade permits, based his decision to charge a $100 fee solely on the efforts he expended researching the plaintiff's application, and not on the potential cost of attendant police protection which might be occasioned by the parade. Like the ordinance in *Walsh*, the instant ordinance vests much discretion in the County Administrator in determining an appropriate fee. However, unlike the *Walsh* ordinance, insofar as the County Administrator charges a fee for the costs of investigating the application, the constitutional concerns of *Walsh* dissipate. This is because the determination of the fee under those circumstances is based solely upon content-neutral criteria; namely, the actual costs incurred investigating

and processing the application, regardless of the nature of the applicant's proposed assembly.

The court notes that the instant ordinance alternatively permits fees to be assessed based upon "the expense incident to . . . the maintenance of public order." If the county had applied this portion of the statute, the phrase might run afoul of the constitutional concerns raised by the Eleventh Circuit in *Walsh*. Thus, in the appropriate case, a court might be required to strike the portion of the statute which permits fees to be assessed based upon the costs incident to maintaining public order. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972); *Dombrowski v. Pfister*, 380 U.S. 479, 490-91 (1965) (holding that a narrowing construction is appropriate when readily apparent).

However, in the instant case, plaintiff did not base their argument upon this phrase, but contended that the mere fact that a $100 fee was imposed is unconstitutional, especially in light of the organization's financial circumstances. The evidence was clear that the fee was based solely upon the costs of processing the application and plaintiff produced no evidence to the contrary. The court need not reach constitutional issues which are not squarely before it. Accordingly, the court finds that the county ordinance, as applied in this case, is not unconstitutional.

Forsyth County School Board Permit

Plaintiff initially requested that the Forsyth County School Board allow plaintiff's members to use the high school parking lot for parking and to assemble for the parade from the high school to downtown Cumming. The



school board gave plaintiff permission to use the parking lot for this purpose on the condition that plaintiff obtain any required permits, pay any required fees to the appropriate city and county entities, that plaintiffs do not damage or litter the grounds, and that the function not interfere with any planned school functions.

By letter dated January 4, 1989, the school board reiterated these conditions. However, when plaintiffs learned that the city may not allow them to march in the morning, they requested that they be allowed to use the school lot for the entire event, including the actual rally. The school board denied this alternative request on the ground that the school gym is to be used for a basketball tournament the entire day and plaintiff's rally would be disruptive and incompatible with a community sporting event. The local attorney for the School Board testified that the Board's decision was not based upon the content of the proposed speech.

Since the court has upheld both the city and county ordinances, the court finds that the school board properly conditioned use of the parking lot on compliance with city and county regulations. In addition, the court finds that the school board's refusal to permit plaintiff to hold a rally on school grounds does not violate plaintiff's First Amendment rights.

First, testimony at trial showed that a basketball tournament had been previously scheduled to take place from 9:00 a.m. through 4:00 p.m. on January 21, 1989. The participants in the tournament will be boys aged 11 and 12 who will most likely be accompanied by their families and young friends. Numerous games are scheduled to

take place all day long and the participants will most likely be going to and from the school building throughout the day. To reach the gym, the players and their fans will have to go through the parking lot where plaintiffs wish to hold a rally. Plaintiff has estimated that approximately 200 persons will attend the rally.

The question is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The court finds that use of the parking lot for a rally is incompatible with the previously planned use of the school gym for a basketball tournament.

Plaintiff and its "affiliate", the Forsyth County Defense League, have held previous rallies in Cumming and the Atlanta metropolitan area. The court has observed that plaintiff's rallies and marches are often loud and attract boisterous and sometimes violent "counter-demonstrators." In addition, due to the number of people anticipated to take part in the January 21, 1989 rally, there is a great likelihood for confusion and that the previously scheduled activity or normal school activities will be interrupted.

Where there are "conflicting demands for use of the same place", the state may be compelled "to make choices among competing users and uses. And the State may have a legitimate interest in prohibiting some [uses] to protect public order." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 98 (1972). Here, there was no evidence that the school board based its decision on the content of plaintiff's speech. Indeed, the board has given



permission for plaintiff's members to park their cars in the lot and to assemble for the parade. However, the potential for noise and violence is great and the court finds that the school board's refusal to allow plaintiff to hold a rally in the school parking lot is reasonable.

Accordingly, the plaintiff's motion for a temporary restraining order is denied in all respects.

Inasmuch as this order, inter alia, takes action involving the conduct of attorney Richard Barrett, it is directed that a copy of the order be sent to the State Bar of Georgia, Office of Bar Admissions.

IT IS SO ORDERED this 23rd day of January, 1989.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

## APPENDIX B

**The NATIONALIST MOVEMENT, a Mississippi non-profit corporation incorporated in Georgia, Plaintiff-Appellant,**

**v.**

**The CITY OF CUMMING, FORSYTH COUNTY, GEORGIA, Forsyth County Board of Education, Defendants-Appellees.**

**No. 89-8417.**

United States Court of Appeals,
Eleventh Circuit.

Oct. 2, 1990.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and COX, Circuit Judges, and GODBOLD, Senior Circuit Judge.

GODBOLD, Senior Circuit Judge:

This case arose out of the efforts of a group called the Nationalist Movement to conduct a parade and rally in Cumming, Forsyth County, Georgia, in January 1989. The Movement had held a parade and rally in Cumming in January 1988 to express its opposition to the federal holiday commemorating the birthday of Dr. Martin Luther King, Jr. It wished to hold a similar parade and rally on January 21, 1989, the date of the King holiday, in order to again express its opposition.

To carry out its plan the Movement applied for permits from three distinct public bodies: the City of Cumming, Forsyth County, and the Forsyth County Board of Education. During months of negotiations the details of



the proposed event changed from time to time, and several amendments, suggestions, and alternatives were considered, but the major thrust of the plan ran this way: the Movement proposed that participants assemble on the grounds of the Forsyth County High School in Cumming, march along a public street to the county courthouse square, and there conduct a rally and speeches for one and a half to two hours. When the rally ended participants were to march back along the same route to the high school and disperse.

Initially the events were planned for Saturday afternoon, January 21. The Movement applied to the Superintendent of Education for permission to assemble on the high school grounds. It applied to the City Administrator for a permit to parade along a designated street, going to and coming from the courthouse square, and it applied to the County Administrator for a permit to conduct a rally on the courthouse steps.

The Movement was not successful in securing permits on terms and conditions agreeable to it. After an initial denial (until the Movement could show that it had an assembly point for the rally off the right of way of the street, the City Commission granted a parade permit for a parade to commence at 1:00 p.m. on Saturday, January 21, from the high school, to proceed to the courthouse, and to return. The City refused to close all traffic on the street during the parade and limited the Movement to the use of only one lane of the two-lane street.

After receiving this authorization, the Movement decided to change the time of its event in Cumming. It scheduled a rally in Atlanta for the afternoon of January

21 and received authorization from the City of Atlanta to conduct it. The Movement then sought to shift events in Cumming to Saturday morning, beginning at 9:00 a.m., planning to inform participants there of the Atlanta events and to urge them to attend. The City declined to change the authorized parade time because of the following provision of the City Parade and Assembly Ordinance.

> [N]o private organization or group of private persons may use the roads immediately adjacent to and those roads which lead directly to the Forsyth County Courthouse grounds for private purposes of holding a parade, assembly, demonstration, or other similar activity on any non-holiday weekday prior to 8:00 a.m. or after 5:00 p.m. *or on any Saturday,* Sunday, or public holiday *prior to 1:00 p.m. or after 5:00 p.m.*

City Amended Parade and Assembly Ordinance, § 6(g) (emphasis added).[1]

On December 30, 1988, the County approved the Movement's application for a rally on the courthouse steps and grounds lasting from about 8:00 a.m. to 11:00 a.m. on January 21, subject to the payment of a $100 application fee. A few days later, the Board of Education

---

[1] This provision was enacted as part of an Amended Ordinance adopted October 1, 1987. Interpretation of this language at the hearing in a dialogue between the court and counsel for the City, Rec. III, at pp. 208-209, proved somewhat murky. But the "Saturday morning ban," which limits a parade on the streets on a Saturday to the hours between 1:00 p.m. and 5:00 p.m. is clear.



gave its consent for the participants to assemble on January 21 at the high school, conditioned first upon the Movement's obtaining permission from the City and County to conduct its parade and assembly and, second, on the requirement that the premises not be damaged or littered.

While continuing to negotiate with the City about the timing of the event, the Movement discussed with a lawyer for the Board of Education an alternative authorization to use the high school parking lot for its rally and speeches in the event the parade and the rally at the courthouse were "interfered with." It is uncertain whether this request was ever presented to the Board or was merely discussed with its counsel, but, in any event, approval to conduct a rally and speeches on school grounds was not given.

On January 19 the Movement filed suit in the district court for the Northern District of Georgia seeking a temporary restraining order, temporary and permanent injunction, compensatory and punitive damages, and attorney fees. On this same day the district court conducted a hearing on the request for a TRO. On January 23 it entered a written order denying the request. Two days later, January 25, the court entered a final judgment dismissing the case on the merits.

## I. The City

The Movement contends that the section of the City's parade ordinance that bans parades and assemblies on Saturday mornings on streets adjacent to, or leading to, the county courthouse, violates the First Amendment on

its face and as applied. Indisputably the proposed parade involves First Amendment activity. Also beyond dispute is the fact that this ordinance regulates such activity within a traditional public forum, indeed, "the archetype of a traditional public forum," public streets. *Frisby v. Schultz*, 487 U.S. 474, 480-81, 108 S.Ct. 2495, 2499-2500, 101 L.Ed.2d 420 (1988). *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983); *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939) (Roberts, J., joined by Hughes, C.J., and Black, J.). Our method of determining the constitutionality of the ordinance depends initially on whether it regulates expressive activity on the basis of content. If the restriction is based on the content of the expression, then the ordinance must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45, 103 S.Ct. at 954. If the ordinance is content-neutral, then it must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

The district court determined that § 6(g) of the parade ordinance was content-neutral. Although this section was enacted in the wake of previous demonstrations by the plaintiff and its affiliated organizations in Cumming, the ordinance on its face clearly does not discriminate among paraders on the content of their proposed expressive activities. The Movement nonetheless contends that the City's refusal to allow it to hold its activities in the morning was motivated by disagreement with the Movement's message. This contention is refuted by the simple fact that the City granted the Movement's



earlier request to conduct a parade in the afternoon. The district court's determination is correct.

Thus the City's burden is to establish that its ordinance furthers significant municipal interests, that its restrictions are narrowly tailored to achieve those interests, and that those wishing to engage in expressive activity in Cumming have ample alternative means of doing so. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 3069 n. 5, 82 L.Ed.2d 221 (1984) (once plaintiff demonstrates that First Amendment applies, the government bears burden of justifying impingements on protected activity); *id.*, at 309, 104 S.Ct. at 3077 (Marshall, J., joined by Brennan, J., dissenting) ("The First Amendment requires the Government to justify *every* instance of abridgement.") (emphasis in original). Unfortunately, because of the manner in which the hearing on the TRO request developed, the City did not have an opportunity to offer evidence to sustain this burden. After the plaintiff rested, a dialogue followed between court and counsel for all parties. Before permitting the City to present evidence, the court stated from the bench that the City "for some reason" had made a determination that Saturday morning parades were undesirable, that this ban was applied evenhandedly, and that the Movement had alternative means of conducting a parade since Saturday afternoon was available. The court then dismissed the suit against the City. Rec. III, p. 127. The County and the Board of Education then put on

evidence, but the City did not in light of the Court's oral ruling.[2]

We cannot affirm the judgment in favor of the City on the basis of the record before us. Although the City identified some of the governmental interests to be served by the ordinance in its preamble, which we set out in the margin, the record contains no evidence showing how those interests were advanced by a Saturday morning ban on parades and rallies.[3] The City must

---

[2] In its subsequent written order the district court held that the ordinance was not an absolute prohibition on speech but merely regulated the time and manner of the activity, that it was content-neutral, and that there was no evidence it was not applied evenhandedly to all groups. Accordingly, the court found that the ordinance was reasonable, served significant government interests, and did not unduly burden the First Amendment rights of the Movement or its members.

[3] The recitals of findings and purposes contained in an ordinance's preamble can serve to identify governmental interests for the purposes of this analysis. *See Frisby v. Schultz* 487 U.S. 474, 477, 484, 108 S.Ct. 2495, 2498, 2502, 101 L.Ed.2d 420 (1988). Indeed, such recitals may well be entitled to greater weight in identification of governmental interests than post hoc articulations by counsel in judicial proceedings. The City of Cumming set out the following findings in the preamble of its Parade Ordinance.

> WHEREAS the General Assembly of the State of Georgia has delegated the police powers of the State of Georgia to the City of Cumming, Georgia, with respect to persons and property situated within the municipal limits of the City of Cumming, Georgia, and expressly authorized and empowered said
>
> (Continued on following page)



demonstrate the logical and practical relationship between the restriction and these interests, so that the

---

(Continued from previous page)

> Mayor and Council of the City of Cumming, Georgia, to make such rules and regulations with respect to persons or property and all other things affecting the good government of the City as it shall deem requisite and proper for the security, welfare, health, safety, and convenience of the City and for the preservation of the peace and good order of same; and
>
> WHEREAS private organizations and groups of private persons have from time to time sought to use public property and public roads within the jurisdiction of the City of Cumming, Georgia, for private purposes; and
>
> WHEREAS such uses have included parades, assemblies, demonstrations, road closings, and other related activities; and
>
> WHEREAS it is in the public interest that such uses not interfere unduly with the rights of citizens not participating therein nor endanger the public safety nor obstruct the orderly flow of traffic; and
>
> WHEREAS it is right and proper for the security, welfare, health, and convenience of the citizens of the City of Cumming, Georgia, and for the preservation of the peace and good order of said City that rules and regulations relating to parades, assemblies, demonstrations, road closings, and other related activities within the city limits of the city of Cumming, Georgia, be established and that violations of said rules and regulations be punishable in the police court of Cumming as provided by laws; and
>
> WHEREAS the City of Cumming's Administrator shall be empowered to designate reasonable sites
>
> (Continued on following page)

court may determine whether the restriction is substantially broader than is necessary to achieve those ends. *See*

---

(Continued from previous page)

and set reasonable time schedules for the beginning and end of parades, assemblies, demonstrations, road closings, and other related activities where more than one is applied for or where the proposed activity interferes with the public safety or obstructs the orderly flow of traffic; and

WHEREAS the City Administrator should be empowered to cancel the permit for any parade, assembly, demonstration, road closing, or other related activity where the participants fail to appear and begin within any reasonable time of the scheduled time based on other activities permitted or based on the unreasonable interference with the public welfare, peace, safety, health, good order, and convenience to the general public; and

WHEREAS the City Administrator should be empowered to coordinate all of his duties and decisions under this Ordinance with the official designated by the County of Forsyth charged with the same duties and decisions as to parades, assemblies, demonstrations, road closings, and other related activities; and

WHEREAS the Board of Commissioners of Forsyth County, Georgia, has amended its Ordinance to restrict interference with the administration of justice on the Forsyth County Courthouse grounds and to minimize the likelihood of interference with the rights of nonparticipating citizens residing in close proximity to the Forsyth County Courthouse; and

WHEREAS the Mayor and Council of the City of Cumming, Georgia, wish to maintain the free flow of

(Continued on following page)



*Ward v. Rock Against Racism*, ___ U.S. ___, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1391-92 (D.C.Cir. 1990). Requiring any lesser showing would render the "narrow tailoring" factor of the analysis nugatory.

Although the City has not carried its burden of justifying the challenged provision of its ordinance, it has not had a meaningful opportunity to do so. Therefore, we vacate the judgment as to the City and remand for further proceedings on the Movement's complaint against it. The Movement also challenged that aspect of the City's permit limiting the parade to one lane of the two-lane street that leads from the high school to the courthouse. This claim must also be remanded to the district court for further proceedings for the same reasons.[4]

---

(Continued from previous page)

traffic on the roadways around and leading to the Forsyth County Courthouse grounds; and

WHEREAS the Board of Commissioners of Forsyth County, Georgia, have recently amended the County's Ordinance regarding this subject matter, making it advisable and necessary for the Mayor and Council to amend the City's Ordinance to maintain consistency within these respective jurisdictions;

. . .

[4] The City informed the Movement by letter that it had granted the permit. After the statement that the parade is to commence at the high school, the letter contains this parenthetical sentence: "(You must obtain permission from school authorities to use their property for parking and assembling.)" We do not construe this sentence as a provision conditioning

(Continued on following page)

## II. Forsyth County

The Movement attacked as facially unconstitutional the County ordinance providing for a permit fee of up to $1,000 per day for each day that a parade or rally takes place.[5]

---

(Continued from previous page)

the City's permit on Board of Education approval. Rather it appears to be merely a cautionary notice that the City permit does not cover parking or assembling on school property and that permission for those purposes must be obtained from school authorities. Even if this sentence is a formal condition on the City's permit, it amounts to no more than a reasonable decision to hold the Movement to the terms of its application. *See* discussion in section III. of text, *infra*.

[5] Sections 6 and 7 of the Amended County Ordinance, No. 34, provide:

> (6) Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place. The administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed. In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax.
>
> (7) If the private organization be other than individuals, a permit will not issue without the paying of the necessary fee; individuals may be excused from such a deposit on account of indigence upon the execution under oath, by each individual in the group applying for the permit, of a pauper's affidavit. Prior to the receipt of such an affidavit the Administrator shall advise the applicant orally or in writing of the penalties for the execution of a false document.



> The crucial concern here is the extent of the right of the public to use the city streets and parks, which the Supreme Court has regarded as quintessential public forums, to exercise First Amendment activity, without the imposition of pecuniary burdens which allegedly go beyond a municipality's concern of legitimate interests.

*Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1521 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986). In *Central Florida* we considered the constitutionality of an Orlando, Florida ordinance that authorized the Chief of Police to charge persons exercising First Amendment rights the full cost of additional police protection, as a condition to the granting of a permit. We held:

> Although license fees are proper for the costs of administering an event, under the Supreme Court's decision in *Cox v. New Hampshire* [312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941)], we read *Cox* as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities. An ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment. We, therefore, hold that the Orlando City Ordinance 18A.12 which requires persons wishing to use city streets and parks to demonstrate, to prepay an amount of costs for additional police protection determined by the discretion of the chief of police is unconstitutional.

*Id.* at 1523.[6] In the present case the district court recognized that the Forsyth County Administrator, like the Orlando Chief of Police, had great discretion in determining an appropriate fee and held that, under the evidence, the Administrator exercised that discretion by charging for the costs of investigating and processing the application. There was no element of charge for the potential cost of additional police protection or for maintaining public order, and the determination of the fee was based solely upon content-neutral criteria.[7] These distinctions addressed the methodology described in *Central Florida* for determining a fee. But the First Amendment imposes limitations on the *size of a fee* apart from the permissible components of it. To repeat, "we read *Cox* as authorizing only nominal charges for the use of city streets and parks

---

[6] Our interpretation of *Cox* was aided substantially by the latter case of *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), as well as by more recent Supreme Court cases involving traditional public forums. *Central Florida*, 774 F.2d at 1522. Concurring on other grounds, Judge Henderson disagreed with the majority's reading of *Cox*. *Id.* at 1527-28 (Henderson, J., concurring); *see also Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1081 (9th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2590, 110 L.Ed.2d 271 (1990). We have reviewed Supreme Court cases involving public forums decided since *Central Florida*, and find no basis on which to reevaluate its ruling. *See, e.g., Smith v. Duff and Phelps, Inc.*, 891 F.2d 1567, 1570 (11th Cir.1990) (previous decision of this circuit is binding on subsequent panel, unless overruled by the circuit court sitting en banc, or called into question by change in Supreme Court precedent).

[7] The court expressed doubt about the constitutionality of the portion of the ordinance that permits fees to be based upon the costs incident to maintaining public order but considered that issue not squarely before it.



to further First Amendment activities. An ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment." 774 F.2d at 1523.[8] It is not necessary that we stake out the outer limits of a "nominal" charge.[9] It is enough to hold, as we do, that the Forsyth County provision for a permit fee of up to $1,000 for each day that a parade or rally takes place exceeds the constitutional requirement that such a charge be at most nominal.[10]

---

[8] Given our conclusion that the ordinance is facially unconstitutional, we need not address the Movement's arguments concerning the section of the ordinance that exempts certain persons from payment of fees on the basis of their ability to pay. *See Central Florida*, 774 F.2d at 1523-24. At the January 19 hearing counsel for the County attempted to explain the operation of the exemption provision. Despite the attempt, this provision appears to be virtually incomprehensible, at least in its application to corporate applicants like the Movement.

[9] *Central Florida* concerned costs that would arise from furnishing police protection for an event to occur on a nonworkday by using off-duty officers who would be paid time and a half. The Movement contends that assessing a fee for administering a speech event cannot be based, as it was here, upon usual duties performed by regular employees during regular duty hours. We need not decide this issue.

[10] The Movement also challenged the county's imposition of a $100 permit fee on it as an unconstitutional application. Because we hold that the ordinance is facially unconstitutional we do not need to inquire whether the particular imposition of a fee of $100 is unconstitutional.

## III. The Board of Education

The Board of Education granted the Movement permission to assemble on the high school grounds without limitation as to morning or afternoon and without imposition of a permit fee. Nevertheless the Movement contends that its First Amendment rights were violated because the Board conditioned the permit on approval by the City and County of the Movements's parade and rally applications. In its formal application the Movement requested permission only to use the school parking lot as a base from which to assemble, to immediately depart while conducting its other activities, and to return three hours later and disassemble. The participants in the event would thus be on school grounds only a short time prior to the parade and another short time after it. It was also evident in the permit application that the parade and rally would take place well off school grounds. These circumstances were clearly important factors for the Board to consider, since another event, a junior high school basketball tournament, was scheduled to take place on school facilities during the morning and afternoon of the same day as the rally. Thus, the Board's stated "conditions" are no more than restatements of the premises of the plaintiff's application to it. In granting the permit, the Board gave the Movement precisely the authority requested. The Movement's argument that in doing so the Board somehow violated the First Amendment is both ironic and meritless.

Shortly before the date of the King holiday, after arrangements with the City had failed, the Movement requested approval in discussions with the Board's legal counsel to conduct its rally and speeches in the school



parking lot. The Board denied this request on the ground that such a rally would disrupt the previously scheduled basketball tournament.[11] The Movement conceded at the TRO hearing that the school parking lot was not a traditional public forum. The district court noted that the record contained no evidence that the Board of Education had expressly designated this parking lot as an area for speech activity. *See Perry*, 460 U.S. at 45, 103 S.Ct. at 954; *see also United States v. Kokinda*, ___ U.S. ___, 110 S.Ct. 3115, 3121, 111 L.Ed.2d 571 (1990) (plurality opinion) (government does not dedicate an area as a public forum by permitting limited discourse there but only by intentionally opening it for general public discourse) (citing *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985)). Thus, the Board "may reserve the [parking lot] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*. 460 U.S. at 46, 103 S.Ct. at 955. The record demonstrates amply that the Board denied the Movement's request on the basis of its judgment that the plaintiff's assembly was incompatible with the other events taking place at the school that day, not out of disagreement with the Movement's viewpoint. The Board's action was reasonable and did not violate the First Amendment rights of the plaintiff.

---

[11] The record is unclear on the issue of whether the Board of Education actually considered the Movement's request to conduct a rally in the parking lot. We assume for purposes of analysis of this that the Board denied the request.

IV. Evidentiary rulings

In an effort to introduce purported business records of the Movement, its attorney Richard Barrett (who is also its chief executive officer), "appointed" an available member of the organization, Dennis Wheeler, as "acting secretary" on the morning of January 19 and called him at the hearing later that day as a witness to authenticate the records. The witness had no knowledge of the records, could not identify them, and had never seen them until presented them by the attorney that morning. The district court granted defendants' motions to strike the testimony of this witness; therefore, Wheeler was unable to authenticate the records. The court did not err in this ruling. *See* Fed.R.Evid. 602.[12]

The court did not err in taking judicial notice that it had "observed that plaintiff's rallies and marches are often loud and attract boisterous and sometimes violent counter-demonstrators," and that "the potential for noise and violence is great." There had been two previous marches in recent years in Cumming by the Movement, or by what it called its "local affiliate," which it described as operating within the Movement's "corporate umbrella

[12] The Plaintiff argues at length on appeal that the district court erred in refusing to introduce into evidence correspondence and other documents proffered while this witness was on the stand. The argument has no merit. The district court later construed most, if not all, of these documents, as part of the record after counsel for the defendants stipulated to their authenticity. *See* Rec. III, pp. 98-102.



or corporate protection." The marches and counter-marches in the county had been the subject of national publicity and attention and had implicated sharp racial tensions. At least two federal cases involving these prior events had occurred in the same judicial district as the present case, each with considerable fanfare. The district judge's observations were apparently based on local and national media accounts, as well as on public records. Moreover, these facts were generally known within the Cumming and Atlanta areas. Thus, they were proper subjects of judicial notice. *See* Fed.R.Evid. 201(b); *Gilmore v. City of Montgomery*, 417 U.S. 556, 567, 94 S.Ct. 2416, 2423, 41 L.Ed.2d 304 (1974); *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1304 (11th Cir.1988); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1278 n. 33 (5th Cir.1978); *see also Holland v. Wilson*, 737 F.Supp. 82, 84 (M.D.Ala. 1989) (noting violence attending those prior rallies). In any event, the Movement did not request a hearing before the district court on this issue pursuant to Fed.R.Evid. 201(e). *See Norman*, 836 F.2d at 1304 (failure to move for hearing renders issue non-appealable).

V. Rulings Relating to *Pro Hac Vice* Status

At the hearing held on January 19, the district court allowed Barrett to appear in the case *pro hac vice* for the Movement. As the hearing proceeded, however, the district judge made known his ethical concerns about several actions by Barrett, including: presenting Wheeler as a witness to authenticate corporate documents, which the court described as an attempt to create a fraud on the court; making frivolous objections based on an alleged

attorney-client privilege to prevent the truth from emerging about Wheeler's lack of qualifications to testify; concealing from the court his personal interest in the litigation as the proposed Movement speaker in Forsyth County; and asking an adverse witness whether he was a veteran, in an effort to embarrass and disparage him.[13] The judge made clear that these matters raised serious issues about Barrett's compliance with professional ethical standards and stated that he was considering the possibility of sanctions under Fed.R.Civ.P. 11. He announced from the bench:

> I'm going to permit you to conclude this case. You've started it; I'm going to permit you to conclude it. I may or may not ultimately rule upon it based upon the issue that has been raised, but we're in the middle of it. I'm going to have it concluded. The matter's not over. So, if you've got any other evidence to present, present it. Let's get on with it.

Rec. III, p. 94.

---

[13] On the issue of Barrett's interest in the litigation, the Movement contends that the district judge violated Fed.R.Evid. 201 by taking judicial notice of Barrett's activity in the prior demonstrations in Cumming. During the TRO hearing, the judge stated, "It is clear to the court at this time . . . that you're more than an attorney in this case; you are an active participant and party. I became convinced of that when I saw the news broadcast and saw you standing on the back of a pickup truck with a bullhorn whipping up the crowds in Forsyth County in the parade . . . " Rec. III, p. 93. We need not determine whether this observation falls within the category of facts of which a court may take judicial notice under Rule 201(b)(2), since the Movement did not move for a hearing on it under Rule 201(e). *See Norman*, 836 F.2d at 1304.



In its written order of January 23 denying a TRO the court addressed at length Barrett's conduct and concluded that Barrett "is hereby on notice that the court will not grant any future applications to appear *pro hac vice* due to the misconduct which occurred during the hearing in this action." The Movement filed a motion to reconsider this ruling, in which Barrett requested a hearing and an opportunity to respond. On April 25 the court denied this request for a hearing on the grounds that it had informed Barrett of its concerns at the January 19 hearing, and that Barrett had an opportunity to respond to them then. Its order said:

> During the hearing, the court warned counsel that it considered counsel's actions to be improper and that the court would consider Rule 11 sanctions and would probably not allow counsel to appear *pro hac vice* again. 82-84, 94. However, for expediency, counsel was allowed to complete the hearing. . . .
>
> . . . Nevertheless, the court will reconsider its ruling to the extent that the denial of *pro hac vice* applies prospectively. The court hereby amends its previous ruling as follows:
>
> Counsel for plaintiff's authority to appear *pro hac vice* is hereby revoked for purposes of this case only. In future cases before this court, counsel may apply for leave to appear *pro hac vice* and the court will consider such applications on a case by case basis.
>
> Accordingly, the motion for reconsideration is granted to the extent that the court has

modified its order as set forth immediately above.The motion is denied in all other respects.

Rec. II, Document 20, pp. 3-9 (footnote omitted).

We are unsure what the court intended by these rulings on Barrett's *pro hac vice* status. We believe the matter can be best laid to rest on remand by the district court's clarifying its intentions and by our stating at this time the governing principles that then would be applicable.[14]

If the court intended that Barrett would be permitted to "conclude this case," then Barrett has suffered no deprivation. He can finish the present case but, as set out in the April 25 order quoted above, in any future case he must apply for *pro hac vice* status. This is what he would be required to do anyhow. *Pro hac vice* status is for a case, or for a described matter within a case, and is not a continuing authorization.

On the other hand, if on remand the district court clarifies its orders by stating that it intended to revoke, and has revoked, Barrett's authority to appear in this case beyond the TRO hearing, we hold that Barrett's objections to revocation by the district court are not well taken. The preliminary legal issue presented is whether the district court satisfied procedural constraints on its authority to revoke *pro hac vice* status. In *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367 (11th Cir.1989), the Eleventh Circuit declared that when a court

---

[14] We address these issues in the interest of efficiency and expedition. We do not, by addressing them, imply or even hint at what the district court's position should be on remand.



admits an attorney *pro hac vice*, it may not later revoke this status without notice of the charges against him and an opportunity to explain. *Id.* at 1371-72 (citing *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1211 (11th Cir.1985)). Barrett contends that the district court did not provide him these notice and hearing rights. We disagree. A separate hearing on this issue is not necessary in every case. *Johnson v. Trueblood*, 629 F.2d 302, 304 (3rd Cir. 1980), *cited in Kirkland*, 884 F.2d at 1372 n. 12. In this case the district court put Barrett on clear notice of its concerns during the course of the January 19 hearing and allowed him an opportunity to explain his actions there.[15] Moreover, since the conduct forming the factual basis of the court's ruling occurred in court before the district judge, a separate hearing was not necessary for factfinding purposes.

The district judge's findings of fact on the revocation issue are reviewed on a clearly erroneous standard. *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 619 (11th Cir.1983). We give great regard to the district court's findings supporting its decision in this case, including those bearing on Barrett's motivations and state of mind, since those findings are based on the judge's "observation of witnesses, [and] his superior opportunity to get 'the feel of the case.' " *Id.* (quoting *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 71 (2d Cir.1967) (Friendly, J.)).

---

[15] These facts readily distinguish this case from the situations in *Kleiner* and *Kirkland*, where the disqualified attorneys were given no notice of the factual concerns of the court before disqualification. *See Kirkland*, 884 F.2d at 1369, 1372 n. 13; *Kleiner*, 751 F.2d at 1199, 1210-11.

In particular, the evidence fully supports the finding that Barrett's examination of witness Wheeler as an "acting secretary" of the Movement was an effort to commit a fraud on the court. Even the cold record demonstrates that Barrett attempted to establish a false appearance of Wheeler's competency to testify and to sponsor documents by giving him a manufactured title, when in reality Wheeler bore neither knowledge of nor responsibility over the subject matter. As this pretense unraveled under cross-examination, Barrett attempted to prevent discovery of the ruse through meritless objections, and later through leading questions on redirect examination.

Finally, we identify the appropriate standard by which to review a conclusion by the district court that revocation is warranted. "Cases applying the standards of the Code of Professional Responsibility to questions of attorney disqualification warrant full appellate review to ensure that there is consistency of treatment." *Norton*, 700 F.2d at 620. Similarly, where disqualification raises other substantial concerns such as a criminal defendant's rights under the Sixth Amendment, the district court's decision is subject to careful examination by the appellate court. *Id.* On the other hand, this case presents unique facts involving the integrity of the court system and respect for its participants within a courtroom proceeding. Under these circumstances, the district court must be accorded some discretion in monitoring its own processes. *Id.* at 619-20; *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir.1976) (en banc), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977). With these principles in mind, we believe that if the district court ruled that Barrett's conduct at the January 19 hearing justified



revocation of his *pro hac vice* status, this ruling fell within the ambit of its appropriate discretion.

## VI. Attorney Fees

The trial court granted the motions of the Board of Education and the City for attorney fees under 42 U.S.C. § 1988, and awarded $4,700 to the City and $1,840 to the Board, on the ground that the suit was frivolous, unreasonable and without foundation. *See, e.g., O'Neal v. DeKalb County*, 850 F.2d 653, 658 (11th Cir.1988). The conclusions that we have reached on the merits of the appeal require that the award of attorney fees in favor of the City be reversed. Although we have affirmed the district court on the merits with respect to the Board of Education, the factual and legal issues relating to the Movement's alternative request to use the school parking lot as the site for its rally and speeches, the Board's prior commitment for use of school premises for a basketball tournament, and the conflict between these events, were not frivolous matters for decision. Thus the award of attorney fees to the Board of Education must also be reversed. *Accord Acorn v. City of Phoenix*, 798 F.2d 1260, 1273 n. 15 (9th Cir.1986).

## VII. Summary

Summarizing, the judgment dismissing the claims against the City is VACATED and these claims are REMANDED for further proceedings in which the City is entitled, if it wishes, to an opportunity to justify the challenged provisions of its ordinance. The judgment dismissing the claims against Forsyth County is REVERSED

and judgment shall be entered holding unconstitutional the provision of the County's ordinance providing for a fee of up to $1,000 per day. The judgment dismissing the claims against the Board of Education is AFFIRMED. The rulings of the district court with respect to Barrett's *pro hac vice* status are REMANDED to the district court for further proceedings as described in this opinion. The judgment awarding attorney fees to the City and to the Board of Education is REVERSED.

FAY, Circuit Judge, concurring specially:

I concur in Judge Godbold's scholarly and thoughtful opinion but add one thought because of my concern that the law of our circuit has strayed from the precedents announced by the Supreme Court. Judge Henderson's separate concurrence in the *Central Florida* case, 774 F.2d at 1526, points out the error of reading *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), and *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), as prohibiting the assessment of fees based upon the cost of ensuring public safety and keeping the peace. As Judge Godbold points out, the *Central Florida* opinion is binding upon all of us until modified or overruled by our court sitting en banc. In my opinion, it may be time to do just that.

It simply makes no sense whatsoever to impose upon the public fisc all costs associated with policing rallies, parades or other functions planned by any number of organizations. As Judge Henderson pointed out, "[t]he 'First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.' " *Central Florida*, 774 F.2d at



1529 (Henderson, J., concurring) (quoting *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981)). First amendment rights are not unlimited. Although these rights are precious, I fear we may have jumped too far too fast. A $1,000 fee for the costs associated with processing the application and policing a parade and rally designed to use the city's main street and the county courthouse square for a period of one and a half to two hours strikes me as being extremely nominal.

As the Ninth Circuit recently stated:

> Kaplan argues that *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) as interpreted by *Murdock v. Pennsylvania*, 319 U.S. 105, 116, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1943) allows only a nominal fee to gain access to a limited public forum. *Cox* approved a city-imposed fee of $300 for the use of public streets for a parade by the Jehovah's Witnesses that was a reasonable estimate of the costs of policing the function. The *Murdock* case involved a license fee for home solicitation, unrelated to costs, that the Jehovah's Witnesses contended was a restriction on First Amendment rights. The Court distinguished the license fee from the requirement of a parade permit in *Cox*, noting that "the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." This is not a statement that *only* nominal charges to defray expenses are constitutionally permissible, but rather noting the particular distinction between the facts in *Cox* and those in *Murdock*. We find nothing in *Cox* that requires that all

charges for any public forum be limited to "nominal" charges. For example, certainly reasonable rental charges can be made as a condition for granting the use of a municipal auditorium to any group on a nondiscriminatory basis.

. . . .

In this circuit, we have recognized that it does not violate the First Amendment for a public entity to collect charges that fairly reflect costs incurred by the municipality in connection with an activity involving expression. *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir.1976), *cert. denied sub nom. Leipzig v. Baldwin*, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977).

*Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1081 (9th Cir.1990) (emphasis in original).

It seems to me that the position taken by the Ninth Circuit is both sound and in accord with Supreme Court pronouncements.

---



## APPENDIX C

**The NATIONALIST MOVEMENT, a Mississippi nonprofit corporation incorporated in Georgia, Plaintiff-Appellant,**

**v.**

**The CITY OF CUMMING, FORSYTH COUNTY, GEORGIA, Forsyth County Board of Education, Defendants-Appellees.**

**No. 89-8417.**

United States Court of Appeals,
Eleventh Circuit.

Dec. 18, 1990.

On Appeal from the United States District Court for the Northern District of Georgia, O'Kelley, District Judge, Presiding.

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, COX, BIRCH AND DUBINA, Circuit Judges*.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 2, 1990, 11th Cir., 1990, 913 F.2d 885)

BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing en banc

---

* Judge Edmondson is recused and will not participate in this decision.

and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc without oral argument during the week of February 11, 1991. The clerk will specify a briefing schedule for the filing of en banc briefs. The previous panel's opinion is hereby VACATED.

---



## APPENDIX D

**The NATIONALIST MOVEMENT, a Mississippi non-profit corporation incorporated in Georgia, Plaintiff-Appellant,**

**v.**

**The CITY OF CUMMING, FORSYTH COUNTY, GEORGIA, Forsyth County Board of Education, Defendants-Appellees.**

**No. 89-8417.**

United States Court of Appeals,
Eleventh Circuit.

July 5, 1991.

Appeal from the United States District Court for the Northern District of Georgia; William C. O'Kelley, Chief Judge.

Before TJOFLAT, Chief Judge, and FAY, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, COX, BIRCH and DUBINA, Circuit Judges, and GODBOLD*, Senior Circuit Judge.

PER CURIAM:

A panel of this court held facially unconstitutional the provision of the Forsyth County ordinance requiring advance payment of a fee of up to $1,000 per day for a permit required of a private organization or group of private persons to conduct a parade or public meeting on the roads or other public property of the County. *The*

---

* Senior U.S. Circuit Judge John C. Godbold has elected to participate in further proceedings in this matter pursuant to 28 U.S.C.A. § 46(c).

*Nationalist Movement v. The City of Cumming, Forsyth County, Georgia, Forsyth County Board of Education*, 913 F.2d 885 (1990). The panel decision relied upon the holding of *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1521 (11th Cir.1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986), that only nominal charges are constitutionally authorized for the use of city streets and parks to further First Amendment activities and held that a fee of up to $1,000 per day exceeded the constitutional requirement that such a charge be at most nominal. A majority of the active judges in regular active service ordered that the appeal be reheard by the court en banc in order that the court might consider whether the holding of *Central Florida* relied upon by the panel should be overruled. 921 F.2d 1125 (1990). That order vacated the panel opinion.

The court en banc, having considered the issue above described and having discussed and considered the panel opinion and the briefs of the parties, now reinstated the panel opinion in its entirety.

IT IS SO ORDERED.

TJOFLAT, Chief Judge, concurring in part and dissenting in part in which BIRCH, Circuit Judge, joins:

I respectfully dissent from the court's holding that the Forsyth County (the County) ordinance, pursuant to which the County Administrator (the Administrator) sought to charge the Nationalist Movement (the Movement), a corporation, a $100 fee to assemble on the County courthouse steps, is facially invalid.[1] I believe

---

[1] I concur in the court's disposition of the Movement's claims against the County School Board and the City of Cumming.



that a facial challenge to the ordinance was inappropriate and that we should remand the case to the district court to determine whether the fee assessed here withstands constitutional scrutiny.[2]

In count two of its complaint, the Movement alleged that the County ordinance was facially invalid because it did not prescribe carefully tailored standards for the Administrator when he (1) reviews applications for permits and (2) sets permit fees. In count three – an as-applied challenge – the Movement contended that the Administrator's imposition of the $100 fee on the Movement and his failure to waive that fee rendered the application of the ordinance to the Movement constitutionally infirm. Finally, in court four, the Movement alleged that the Administrator acted to suppress the Movement's speech because he disagreed with its content.[3] Based on these allegations, the Movement sought a temporary restraining order and preliminary and permanent injunctions "enjoining [the County], [its] officers, agents, servants, employees, attorneys and those persons in

---

[2] Although the Movement sought to enjoin the County from interfering with the rally it scheduled for January 21, 1989, the passage of that date has not mooted the case. The Movement (or the Forsyth County Defense League – an independent affiliate of the Movement) had paraded in Forsyth County in 1986, 1987, and 1988, and presumably intends to parade in future years. Thus, the County's conduct is capable of repetition yet would evade review, *see Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911), and so this court will hear the Movement's claim.

[3] Count one involved charges against the City of Cumming.

active concert or participation with [it][4] from interfering in any way with [the Movement's] assembly . . . at the Forsyth County Courthouse between 8:00 AM and 11:00 AM, January 21, 1989."[5] Specifically, it sought to enjoin the enforcement of a County Ordinance "prohibiting [it] from holding [a] rally without pre-paying a $100.00 fee." The Movement also sought declaratory relief against the County that would prohibit the County from using sections 3(6) and 3(7)[6] of the County ordinance "to impose

---

[4] The Movement asked the court to enjoin these County personnel from enforcing the ordinance. The Movement did not, however, make any of those persons parties defendant in the lawsuit; it only named the County. Thus, any injunctive relief the Movement obtains must be directed solely against the County.

[5] Despite this broad language, the Movement does not assert that no time, place, or manner restriction constitutionally can be placed on paraders; rather, it contends that any fee – or any fee greater than a nominal fee – is unconstitutional.

[6] Sections 3(6) and (7) of the ordinance provide:

(6) Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air meeting shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed. In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax.

---

(Continued on following page)



unreasonable or excessive fees, or fees at all upon impecunious nonprofit corporations." The Movement asked that the court declare these sections violative, on their face or as applied, of the Movement's constitutional rights of freedom of speech, association, and assembly.[7]

The district court rejected the Movement's facial challenge, concluding that the Administrator's discretion was properly circumscribed. It then held that the Administrator did not impose an unconstitutional fee in this case; specifically, the court found that the Administrator did not discriminate against the Movement based on the content of its speech. The panel opinion, which a majority of this en banc court reinstates, held, however, that the County ordinance's fee provision was facially invalid because it could result in the imposition of more than a

---

(Continued from previous page)

(7) If the private organization be other than individuals, a permit will not issue without the paying of the necessary fee; individuals may be excused from such a deposit on account of indigence upon the execution under oath, by each individual in the group applying for the permit, of a pauper's affidavit. Prior to the receipt of such an affidavit the Administrator shall advise the applicant orally or in writing of the penalties for the execution of a false document.

[7] The parties and the court generally have treated the corporation as the first amendment proponent that wishes to exercise *its* first amendment rights, *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784, 98 S.Ct. 1407, 1420, 55 L.Ed.2d 707 (1978), i.e., the corporation, rather than individuals, genuinely is doing the speaking. For purposes of this opinion, I treat it similarly.

"nominal" fee, contrary to *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1521 (11th Cir.1985) (interpreting *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) and *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986).

In this opinion, I first, in parts I.A and I.B, examine the overbreadth doctrine and its application to statutory licensing schemes. Then, in part I.C, I consider whether the County ordinance unconstitutionally delegated to the Administrator the authority to set a fee of up to $1000, given that *Cox* sanctions only nominal fees on expressive activities. After discussing the relevant Supreme Court precedent, I conclude that the County ordinance adequately curtails the Administrator's discretion and hence survives facial scrutiny. Finally, in part II, I demonstrate that we should remand this case to the district court to determine whether the $100 fee the Administrator charged the Movement is nominal in light of the Movement's financial resources and the administrative and public order expenses that necessarily would have been occasioned by its proposed assembly.

I.

A.

A litigant who makes a facial challenge to a statute ordinarily "must establish that no set of circumstances exist under which [the statute] would be valid. The fact that [the statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . ." *United States v. Salerno*, 481



U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). In First Amendment cases, however, the Supreme Court has recognized that where a statute covers both protected and unprotected expressive or associational activities, a litigant who himself is engaged in unprotected activity may challenge the statute based on "[its] *potential* reach . . . , *conceivable* sets of circumstances, and *possible* direct and indirect burdens on speech." *American Booksellers v. Webb*, 919 F.2d 1493, 1499-500 (11th Cir.1990). This doctrine, known as the overbreadth doctrine, thus protects the public from the chilling effect that such a statute has on protected speech; the court will strike down the statute even though in the case before the court the governmental entity only enforced the statute against those engaged in unprotected activities. "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society," *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973); thus, when a statute "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected expressive rights, a court may hold the law void on its face. *See Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940).

Although the doctrine and its protective purposes are stated broadly, we must, in applying it, keep in mind two cardinal rules governing the exercise of federal court

jurisdiction. First, the federal courts should not anticipate a question of constitutional law in advance of the necessity of deciding it. Second, the federal courts should not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985); *see also United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960); *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885); *cf. Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2917. Since the overbreadth doctrine represents a deviation from these general principles, we should employ it "sparingly and only as a last resort." *Id.* at 613, 93 S.Ct. at 2916.

Thus, the Court has held that the overbreadth of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," before a federal court may facially invalidate it. *Id.* at 615, 93 S.Ct. at 2918 (substantial overbreadth must be shown "particularly where conduct and not merely speech is involved"); *see also Brockett*, 472 U.S. at 503-04, 105 S.Ct. at 2801-02 (*Broadrick's* substantial overbreadth requirement also is applicable when pure speech rather than expressive conduct is at issue). In addition, a statute is not overbroad when the court can use a narrowing construction that limits the statute's reach to unprotected activity. In sum,

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial," the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation.



*Brockett*, 472 U.S. at 504, 105 S.Ct. at 2802 (footnote omitted).[8] I now examine the application of the overbreadth doctrine to a statutory licensing scheme.

---

[8] *Accord Webb*, 919 F.2d at 1499-500 (considering the potential range of materials covered by a "harmful to minors" statute and the possible burdens the statute placed on adult access):

> the [Supreme] Court has recognized that when overly broad statutory language seems to sweep protected First Amendment expression directly into the scope of a regulation affecting speech, or indirectly places an undue burden on such protected activity, free expression can be chilled even in the absence of the statute's specific application to protected speech. For this reason, the court has recognized the so-called overbreadth doctrine in the limited context of First Amendment facial challenges. Since the overbreadth doctrine in effect requires courts to evaluate the *potential* reach of a statute, *conceivable* sets of circumstances, and *possible* direct and indirect burdens on speech, "[t]he Supreme Court has noted that the overbreadth doctrine is 'strong medicine' that should be employed only 'with hesitation, and then "only as a last resort." ' "

B.

In the quintessential overbreadth challenge, a criminal defendant seeks to overturn his conviction under a statute that encompasses both protected and unprotected expression. The defendant may have engaged in unprotected speech, but the court will permit him to challenge the facial validity of the statute under which he was charged on the ground that the statute is so broad that it chills others from protected speech. In *Lewis v. City of New Orleans*, 415 U.S. 130, 132, 94 S.Ct. 970, 972, 39 L.Ed.2d 214 (1974), for example, the appellant was arrested and convicted for violating a New Orleans ordinance that prohibited persons from "wantonly . . . revil[ing] or . . . us[ing] obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." The Court held that it was immaterial whether the words the appellant used might be punishable under an ordinance that limited the prohibition to fighting words (clearly proscribable conduct). The ordinance could withstand attack only if it was "not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." *Id.* at 134, 94 S.Ct. at 973. In other words, in overturning the appellant's conviction, the Court examined the "conceivable applications" of the New Orleans ordinance, finding that a broad swath of the proscribed conduct was constitutionally protected.

An overbreadth challenge also may lie when a statute, rather than imposing criminal penalties directly, authorizes a government official to administer a licensing



scheme and then criminalizes expressive activity undertaken without first obtaining a license. In an attack on such a scheme, a court asks whether the law delegates "unfettered discretion" to the licensor; if so, the potential for content- or viewpoint-based discrimination becomes so great that the court will invalidate the statute on its face. *See, e.g., Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162 (1969); *Staub v. Baxley*, 355 U.S. 313, 322-25, 78 S.Ct. 277, 282-84, 2 L.Ed.2d 302 (1958); *Kunz v. People of New York*, 340 U.S. 290, 294, 71 S.Ct. 312, 315, 95 L.Ed. 280 (1951); *cf. Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951) (invalidating a licensing *practice* on overbreadth grounds). The court should not assume, however, that the licensor will disregard statutory directives that purport to circumscribe his discretion; only if the standards are themselves constitutionally inadequate will the court facially invalidate the statute.[9] Thus, a licensing statute with "narrowly drawn, reasonable and definite standards for the officials to follow," *id.* at 271, 71 S.Ct. at 327, will survive facial scrutiny.

A statute or ordinance, on the other hand, that grants the licensor unbridled discretion – allowing him surreptitiously to discriminate against speech that he does not like – must fall when challenged. Facial invalidation is proper because the license applicant would find it difficult to show that, in a particular case, the licensor restricted the applicant's speech based on its content.

---

[9] It is, of course, possible that the licensor will disregard the statutory standards, but the defendant can challenge that lapse in either an as-applied or state-law challenge.

While I acknowledge the strength of these concerns, I believe that the government properly may give public officials charged with administering licensing schemes a considerable degree of discretion before constitutional concerns are implicated.[10]

C.

1.

In the instant case, the Movement makes two contentions. It first contends that the County ordinance did not prescribe sufficiently tailored standards for the Administrator to use in reviewing permit applications. An examination of the ordinance reveals, however, that this contention is baseless:

> Unless some significant interference with the rights of non-participating citizens exists, or the orderly flow of traffic would be obstructed unreasonably, or the public safety be endangered, or there be other unreasonable interference with the public welfare, peace, safety, health, good order, and convenience of the general public, the permit shall be granted.
>
> Where more than one permit is sought for the same date, the administrator shall have authority to designate reasonable sites and set time schedules for the beginning and ending of the activity. The administrator shall have

[10] This parallels the notion that a statue must be substantially overbroad before it is subject to facial invalidation; in both licensing and nonlicensing cases, the statute must sweep a significant range of protected activity within its reach or it will survive facial challenge.



> authority to cancel the permit where the activity fails to begin within a reasonable time after the time set for it to begin, based on other activities for which permits have been granted or based on the unreasonable interference caused by such delay with the public welfare, peace, safety, health, good order and convenience to the general public.

Amended County Ordinance § 7(c). These requirements adequately circumscribe the Administrator's discretion; he must issue a permit unless he can point to a specific instance in which the ordinance permits him to deny a permit or reasonably modify the applicant's requested schedule or situs. *Cf. Hague v. CIO*, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (affirming facial invalidation of ordinance that did *not* "make comfort or convenience in the use of streets or parks the standard of official action" but enabled the licensor "to refuse a permit on his mere opinion that such refusal [would] prevent 'riots, disturbances or disorderly assemblage' ").

The Movement argues alternatively that the County ordinance does not provide narrowly-drawn, reasonable standards for the Administrator to use in setting fees. Although the ordinance allows the Administrator considerable scope in assessing a fee, it limits his discretion in two important respects: it limits the permissible range of fees that the Administrator can charge, from zero to $1000, and the permissible components of the fee, sums necessary to meet the expenses incident to (1) the administration of the ordinance and (2) the maintenance of public order. These limitations mirror the statutory limitations that the Supreme Court upheld in *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

In *Cox*, a New Hampshire statute that imposed a "reasonable" license fee for each day of a parade, procession, or open-air public meeting, and criminal penalties for activity undertaken without such a license, survived constitutional scrutiny. The facts were as follows. A group of Jehovah's Witnesses paraded in the business district of the City of Manchester without a license; they were arrested and later convicted for violating the statute. They then challenged the facial validity of the statute on first amendment grounds.

The Supreme Court, on direct review, upheld the convictions even though the statute permitted the licensor to charge a fee of "not more than three hundred dollars for each day such licensee shall perform or exhibit, or such parade, procession or open-air meeting shall take place." *Id.* at 571 n. 1, 61 S.Ct. at 764 n. 1. The Court emphasized that a prior state supreme court opinion had construed the statute to require "a reasonable fixing of the amount of the fee." *Id.*[11] In addition, the state court had held that the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Id.* at 577, 61 S.Ct. at 766. The

[11] The state supreme court also noted that under the New Hampshire statute "the charge for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted." *Cox*, 312 U.S. at 576-77, 61 S.Ct. at 766.



Supreme Court determined that a fee "limited to the purpose stated" was constitutional, *id.*, at least so long as it has been administered in a fair and nondiscriminatory manner, as required by the state court construction, *id.*

The Court then contrasted the discretion granted to the *Cox* licensor with the discretion of the licensor in *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). In *Hague*, the licensor had minimal standards to guide him in reviewing applications. He could prohibit assembly on the streets, but he was not instructed to make "comfort or convenience in the use of streets the standard of official action"; rather, he was to refuse to issue a permit if, in his opinion, such refusal would prevent "riots, disturbances or disorderly assemblage." *Cox*, 312 U.S. at 577, 61 S.Ct. at 766. After considering that limitation, the Court held that the licensor's discretion was not sufficiently channeled and, hence, was unconstitutional. *Hague*, 307 U.S. at 516, 59 S.Ct. at 964. The statute in *Cox*, on the other hand, instructed the licensor to approve all applications if "the convenience of the public in the use of the streets would not thereby be unduly disturbed" – he merely could assess a reasonable fee for doing so.

Even though the discretion accorded to the licensor in *Hague* was far more sweeping than that in *Cox*, the *Cox* licensor – as well as the Administrator here – could, contrary to statute and the Constitution, adjust the fee to discriminate on the basis of content or viewpoint. If, for example, the licensor opposed the parade application of an impecunious pro-life group, on the basis of its views, and supported the application of an impecunious pro-choice group, he could, under the ordinance, charge the

full administrative and public order expenses (up to $1000) to the pro-life group, while charging the pro-choice group a $1 fee. He thus could set a fee that effectively would prohibit the pro-life group from parading.[12] While recognizing some potential for content-based discrimination, *Cox* held that the restrictions the statute placed on the licensor would curtail such abuses of discretion. First, the statute, in that case, placed a cap of $300 on the fee that the licensor could charge the applicant. Thus, even if the licensor misused his discretion, the barrier he erected would not be, in theory, absolute. The statute also limited the permissible components of the fee. Thus, if the licensor calculated the administrative and public order expenses associated with the pro-life group march at only $50, he could charge no more.

Given these inherent limits on the licensor's authority, the Court next considered the benefits that would be realized by permitting the licensor some leeway in assessing fees. The Court noted that the statute's scope of discretion, although carrying with it the possibility for content-based discrimination, permitted a licensor to adjust fees in accordance with the actual administrative and public order costs an applicant imposed on the state

---

[12] The ordinance could be read to prohibit this type of discrimination – under one interpretation, the ordinance compels the Administrator to impose the *full* administrative and public order expenses on the applicant. (The ordinance states the "[t]he Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.") This was not, however, the interpretation adopted by the Administrator here.



rather than simply imposing a flat fee that approximates those costs (the average cost imposed by all applicants). Consequently, if an applicant requested permission to assemble with five other persons in a county park, then he would pay less than fifteen hundred people who wanted to parade down a major thoroughfare; likewise, the applicant with meager resources would pay less than the applicant with plentiful resources. The Court "perceive[d] no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought." *Id.* I, too, believe that the ability to draw these distinctions is desirable.

Since the limits the County ordinance places on the Administrator's discretion to set a permit fee accord with the limits on the licensor's discretion in *Cox*,[13] that case should control unless later Supreme Court precedent or congressional directives instruct otherwise.

2.

The panel opinion, and now the majority of the en banc court, holds that the County ordinance is facially invalid because it permits the Administrator to assess more than a nominal fee. According to the court, the Constitution limits not only the permissible components of a fee – the cost of administering the ordinance and the

---

[13] Even though the County ordinance permits the Administrator to assess up to a $1000 fee – not simply a $300 fee – a $1000 fee imposed in 1990 would be less, when adjusted by the consumer price index, than a $300 fee imposed in the *Cox* case in 1941.

maintenance of public order – but also its size. *Nationalist Movement v. City of Cumming*, 913 F.2d 885, 891 (11th Cir.1990). The court does not adequately explain, however, why the fee must be nominal, or even what that term means in this context; it merely tells us that the Supreme Court, in *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), read *Cox* to sanction only a nominal fee. The panel opinion, and the en banc court, thus adopt the interpretation of *Cox* and *Murdock* employed by a panel of this court in *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1521 (11th Cir.1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986).

In *Walsh*, a panel of this court invalidated an ordinance that forced persons using city streets and parks for expressive activities to pay the full cost of additional police protection necessitated by those activities. In that case, an organization calling for a nuclear freeze (the Campaign) wanted to conduct a parade and rally in the City of Orlando (the City); approximately one thousand people were expected to attend. Before the City would issue a permit, the Campaign had to pay the City $1435.74 for the additional officers needed to police the march. The chief of police, who had authority under the ordinance to "determine whether and to what extent additional police protection reasonably w[ould] be required for the assembly for purposes of traffic and crowd control," *id.* at 1516 n. 2, considered several factors – including his belief that due to the controversial nature of the rally, the close proximity of Martin Marietta, and the probable attendance of out-of-town demonstrators,



"the potential for hostile counter activity existed"[14] – and determined that more than the usual number of officers were needed to police the event.

In assessing the constitutionality of Orlando's ordinance, the panel had this to say about *Cox*:

> The [*Cox*] Court therefore viewed the fee requirement as charges to meet expenses incidental to the administration of the regulation and the costs of policing the event. Although the Court did uphold the fee requirement, it is important to note that the Court did not touch on the reasonableness of the fees or how they could be fixed. Thus, important questions still remain about the application of *Cox* under modern constitutional doctrine. Importantly, the *Cox* Court did not address circumstances where persons who wish to demonstrate are unable to pay the required fee, nor did the Court concern itself with a statute which is unlimited in the amount of fees that can be charged as expenses, nor with the question whether the charge can be based, at least partially[,] on the content of the speech.

*Id.* at 1522. The court went on to consider the degree to which *Murdock*, *see infra* p. 4022, clarified when a governmental entity can charge fees as a prerequisite to the exercise of First Amendment rights in a traditional public forum. It concluded that *Murdock* only authorizes such an entity to charge a fee that is both nominal and related to the expenses incidental to the administration and policing of the event. *Id.*; *see also id.* at 1523 ("Although license

---

[14] The ordinance required the Chief to consider such factors as the size, location, and nature of the assembly.

fees are proper for the costs of administering an event, under the Supreme Court's decision in *Cox v. New Hampshire*, we read *Cox* as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities."). *Contrast Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1081 (9th Cir.1990) (more than a nominal fee for use of a nontraditional public forum is permissible). Although the panel did not clearly state why only nominal fees survive constitutional scrutiny, the court noted that to the extent that the fees charged to the Campaign were tied to its views – i.e., more police protection was required for demonstrators with more controversial views – the fees were unconstitutional, *id.* at 1524-25; while the presence of out-of-town demonstrators and the potential for hostile counteractivity were proper factors to be considered in determining what level of police protection was needed for a public demonstration, such factors could not be considered in fixing the fee to be charged to those seeking to exercise their first amendment rights. The court stated:

> The effect of the Orlando ordinance, as applied in the case at hand, is to charge more for First Amendment activity which may require more police protection than less controversial speech; such a result places an undue burden on speech which is constitutionally unacceptable.

*Id.* at 1525.

I agree with this reading of *Cox* and *Murdock*, but I also believe that we should explain why only a "nominal" fee is constitutional – an idea that neither the panel opinion in the instant case nor *Central Florida* sufficiently developed. Once the reasoning that underlies the rule is



revealed, it becomes apparent that the facial challenge to the statute in *Cox* would still fail today – the *Cox* Court properly determined that the licensor's discretion was limited in accordance with the Constitution. I first examine the relevant Supreme Court authorities, which tell us when the licensor's discretion exceeds the constitutional limits, and then analyze the Forsyth County ordinance in light of them.

In *Murdock*, a case decided only two years after *Cox*, the Supreme Court carefully circumscribed the *Cox* holding. *Murdock* involved a city ordinance that required all persons who solicited orders for any kind of merchandise to procure a license at a specified cost. *Murdock*, 319 U.S. at 106, 63 S.Ct. at 872 ("[f]or one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), [and] for three weeks twenty dollars ($20.00)"). Jehovah's Witnesses, who had distributed literature and solicited door-to-door, were convicted and fined for engaging in such expressive activities without first purchasing licenses.

The Supreme Court struck down the ordinance as applied; the petitioners were engaged in selling activities merely incidental to their main object, which was to preach and publicize the doctrines of their order. The government, the Court held, could not impose a substantial financial burden on the petitioners simply for exercising their constitutional rights. *Id.* at 112-13, 63 S.Ct. at 874-75. The Supreme Court then contrasted the license fee in *Murdock* to a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. *Id.* at 113-14, 63 S.Ct. at 875. According to the

Court, the situation before it clearly was unlike that in *Cox*; in *Cox* the state regulated the streets

> to protect and insure the safety, comfort, or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. *And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors.*

*Id.* at 116, 63 S.Ct. at 876 (citation omitted; emphasis added). This language, I believe, restricts *Cox* to the proposition that any fee imposed on the exercise of first amendment rights in a traditional public forum, even if calculated to defray the administrative or public order expenses associated with the activity, must be nominal if it is to survive constitutional scrutiny.[15] It is important, however, to consider the reasons underlying the *Murdock* holding.

---

[15] The implications of this language are even more restrictive. In *Murdock*, the Court indicated that a nominal fee could be exacted to cover the costs of protecting those who might be harmed by the exercise of constitutional rights. At least in some instances in which members of an organization seek a parade permit, the police protection and maintenance of public order is necessitated by the potential disruptiveness of the crowd – not the participants in the parade.



I believe that the *Murdock* Court characterized such license fees as "nominal" because it recognized that anything more than a nominal fee likely would be content – or viewpoint-based – on its face or in its impact – and thus contrary to the First Amendment, *see, e.g., United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983) (government may enforce reasonable time, place, and manner regulations in public forums as long as the restrictions are content-neutral); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 96, 97 S.Ct. 1614, 1620, 52 L.Ed.2d 155 (1977). *See generally* Stephan, *The First Amendment and Content Discrimination*, 68 Va. L.Rev. 203 (1982). For example, if the Administrator calculated the public order expense to include the cost of protecting the Movement from irate citizens of Forsyth County, the public order expense would vary directly with the controversy surrounding the Movement's views, i.e., it would be content-based. If these costs constitutionally could be shifted, opponents of the Movement effectively could prevent its speech by civil disobedience (the heckler's veto). Likewise, if the Administrator spends an inordinate amount of time on the Movement's application because he feels that its assembly carries with it the potential for conflict, the Administrator's actions are related to the content of the Movement's speech. The Administrator may, for example, talk for hours with the chief of police, conferring with him as to how they can avert a breach of the peace by counterdemonstrators. Or he may seek counsel from the County attorney, or advice from the County commissioners, as to whether he may deny the Movement's petition because he would prefer that the Movement not assemble in the County. In either

instance, the administrative expenses are related to the content of the Movement's speech, and it would be unconstitutional to assess it any percentage of these costs. Because of this potential for content-based discrimination, the *Murdock* Court, as a prophylactic rule, requires licensors to impose only nominal fees – even in cases in which the content neutrality of the charges has not been questioned. Thus, a license fee must be both nominal *and* content-neutral.

While the *Murdock* Court did not elaborate on the precise meaning of "nominal," it seems that the fee must be small in relation to the total administrative and public order expenses *necessary* for the County to perform its obligations and small in relation to the applicant's financial resources. According to Webster's New World Dictionary (D. Guralnick 2d ed. 1972), "nominal" may mean either "in name only, not in fact {the *nominal* leader} [or] very small compared to usual expectations; slight {a *nominal* fee}." *Cf.* Black's Law Dictionary 946 (5th ed. 1979) ("[n]ot real or actual; merely named, stated, or given, without reference to actual conditions; often with the implication that the thing named is so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the name"). If, however, the Court had used nominal to denote "in name only": a "peppercorn" or a dollar, it presumably would not have articulated two permissible components of the fee. Given then the potential range of fees that constitutionally may be assessed, I do not believe that the County ordinance



sweeps so broadly that we must facially invalidate it.[16] Instead, I believe that the Movement should prevail only if it can demonstrate that, in the instant case, the Administrator assessed it an unconstitutional fee.

II.

While a nominal fee related solely to the cost of processing an application would be acceptable under Supreme Court precedent, *see Cox*, 312 U.S. at 577, 61 S.Ct. at 766; *Murdock*, 319 U.S. at 116, 63 S.Ct. at 876, a fee, whether relating to administrative or public order expenses, that has a substantial disparate impact on persons espousing controversial views is unconstitutional. The district court found, however, that the Administrator based his decision to charge a $100 fee

> solely on the efforts he expended researching the plaintiff's application, and not on the potential cost of attendant police protection which might be occasioned by the parade. . . . [T]he determination of the fee under those circumstances is based solely upon content-neutral critera; namely, the actual costs incurred investigating and processing the application, regardless of the nature of the applicant's proposed assembly.

---

[16] In *Walsh*, this court does state that the City ordinance gave the chief of police unbridled discretion and, consequently, it should be facially invalidated on that ground as well. I believe that *Cox* forecloses this approach. (*Walsh* is, in any case, distinguishable. The Orlando ordinance permitted an *unlimited* charge for additional police protection based on factors such as the "size, location and nature of the assembly.")

Thus, the district court held that the Forsyth ordinance did not implicate the constitutional concerns expressed in *Central Florida* that the fee might be content-based. (The court did not, however, examine whether the Forsyth ordinance provided for a nominal fee; rather, it looked at the lawful components of that fee, holding that, under the facts of this case, the fee was based solely on the costs of processing the application and that this was constitutionally permissible.) While I do not believe that administrative expenses necessarily are content-neutral, *see supra* pp. 4023-4024, on the facts of this case, I believe that the district court did not err in determining that there was no discrimination.[17] Even if, however, the fee imposed was

---

[17] The Movement presented no evidence that the fee was assessed on the basis of content, nor does the fee seem to be so excessive, particularly considering the facts surrounding the application process, that we necessarily are led to that conclusion. The Movement first submitted its application to the County in April 1987, over nine months before the rally. The County, relying on the terms of its amended ordinance, determined that the Movement improperly submitted the application more than 60 days prior to the scheduled event. The Administrator reviewed the application with the county attorney and determined that it must be resubmitted within the applicable deadlines. The Movement then reapplied within the County timetable and the Administrator processed this request. Before the Administrator made a final decision on the application, however, the Movement decided to change its scheduled assembly time, from the morning to the afternoon of January 21st. After reviewing this amendment, the Administrator approved the application and sent a letter to the Movement stating that it would be permitted to assembly subject to payment of a $100 license fee. In essence, the Movement made three applications.



content-neutral, the district court should have determined whether the fee was nominal, i.e., was it small relative to the *necessary* fees incurred by the County[18] and the applicant's resources. Thus, I would REMAND the case to the district court so that it may address this issue.[19]

FAY, Circuit Judge, dissenting, in which ANDERSON and EDMONDSON, Circuit Judges, join:

---

[18] Such an inquiry requires the district court to examine whether the time the Administrator spent on the Movement's application was reasonably necessary, e.g., was the time spent in consultation with County counsel appropriately considered as a cost of processing the Movement's application or was it attributable to general "start-up" costs, i.e., establishing general interpretive principles concerning the statute, that should be spread among current and future applicants? Necessary administrative expenses likely would vary depending on the location of the governmental entity; administrative expenses in New York City, for example, may be significantly higher than in Forsyth County, Georgia. In addition, I note that when the County purports to limit itself to charging a portion of the administrative fees, the fee it charges must be nominal in relation to those fees and not necessarily in relation to the total of administrative and public order expenses.

[19] Since I believe that the calculation of a nominal fee encompasses a determination of a fee that is small in relation to the resources of the applicant, I do not believe that the fee waiver provisions, even if uncertain, implicates its own constitutional concern. If, for example, a licensor assesses a $100 fee on an impecunious applicant and then refuses to waive that fee, the applicant challenges that levy on the ground that it is not nominal, not that the licensor would not waive the fee. On these facts, the applicant will prevail since a $100 fee is not nominal in relation to his resources.

A majority of the en banc court has reaffirmed the law of our circuit as established in *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir.1985) that only nominal charges are constitutionally authorized for the use of city streets and parks in connection with parades and rallies in furtherance of First Amendment activities. Although I am pleased that the en banc court considered this important question, it is my opinion that we continue to misread and misinterpret *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) and *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Most respectfully I dissent for the reasons stated in my special concurrence filed with the panel opinion.

---



## APPENDIX E

**Atlanta Journal and Constitution, January 18, 1987**

**Violent protesters disrupt Forsyth march**
**Klansmen throw bottles and rocks at demonstrators**
By John Brady and Joe Earle Staff Writers

CUMMING, Ga. – Ku Klux Klansmen and their sympathizers threw bottles and rocks at marchers here Saturday, turning a "brotherhood anti-intimidation" demonstration into a violent confrontation.

Some of the estimated 90 marchers were bruised or cut slightly, but no one was seriously injured in the attacks, law enforcement officials said later.

Eight counterdemonstrators were arrested on charges ranging from disorderly conduct to trespassing to carrying concealed weapons, said Forsyth County Sheriff Wesley Walraven.

The violence erupted as about 400 counterdemonstrators, some wearing robes and camouflage fatigues, lined the parade route, shouting racial slurs at the marchers, who had gathered about two miles outside of Cumming on Georgia 141.

The Klan members and supporters chanted "Go home, nigger!" and carried signs such as "Forsyth Stays White" and "Sickle Cell Anemia – The Great White Hope."

The counterdemonstrators were able to get around beleaguered officers flanking the marchers and began throwing rocks and beer bottles. Some of the marchers used coats to cover the heads of children accompanying them.

"Things got out of hand," Walraven said.

About 75 officers from the Georgia Bureau of Investigation, the State Patrol, the sheriff's department and the

local police force were assigned to crowd control for the march, officials said.

"We lost control of the crowd," said Bonnie Pike, inspector of field operations for the GBI.

Law enforcement officials said later that they did not have enough officers on duty, but Walraven said that authorities weren't expecting so many people to show up. "We felt we did the best we could with what we had to work with," he said.

"The police let it get out of hand," said Atlanta City Councilman Hosea Williams, who led the march. "It's just by the grace of God that someone didn't get killed".

"In 30 years in the civil rights movement, I've never seen it worse than this," said Williams, who claimed he was hit by a brick during the assault.

Williams and other marchers emphasized the irony of racial violence occurring just two days before the nation is to celebrate the federal holiday honoring slain civil rights leader Martin Luther King Jr., with whom Williams served as a principal organizer of protests.

"In 1987, who would believe this kind of racial violence in America?" Williams asked. "This is as bad as South Africa."

At an impromptu news conference Saturday evening, Coretta Scott King said she condemned the Forsyth County violence.

"We have learned a valuable lesson today: that we must stay ever vigilant to protect those freedoms which were so clearly won by Dr. King and his non-violent



followers. We pray for the people involved in these violent acts and the people of Forsyth County and for all those injured," she said during the briefing at the Marriott Marquis.

Later Saturday, speaking at a fund-raising dinner for the Martin Luther King Jr. Center for Nonviolent Social Change, Fulton County Commission Chairman Michael Lomax said the incident in Forsyth proved that "racism is alive and well" only 30 miles outside Atlanta.

"Butwe [sic] must show these hate-mongers that decent people outnumber indecent people even in Forsyth County," Lomax said.

The march – scheduled last week by Hall County martial arts instructor Dean Carter to protest the cancellation of a "brotherhood walk" after organizers were threatened – was shortened because of the violence.

After marching about three-fourths of a mile down Georgia 141, the marchers, many of whom were brought to Forsyth County by bus from Atlanta, agreed with a request from Walraven to reboard the bus so they could be separated from the counterdemonstrators.

They sang "The Star-Spangled Banner" as they reboarded.

The marchers then were bused about three-fourths of a mile down the road, where they again began walking.

A grim-faced Walraven led the way as the procession resumed.

"Give me a helmet, we're going to finish this damn march," Walraven said, donning the headgear. "There are

about 50 demonstrators ahead and we're going to let them finish their march if it costs us a head knocking."

Preceded by a dozen Forsyth deputies clad in riot control gear and the helmeted sheriff, and flanked by GBI agents wielding riot batons, the marchers walked another half mile and held a brief rally.

The march ended with a verse of "We Shall Overcome" reworded to "Forsyth, we will be back someday."

After the march, nearly 1,000 Klansmen and sympathizers assembled at the Forsyth County Courthouse in Cumming and listened to speeches from various speakers, including white supremacist J.B. Stoner.

Former Gov. Lester Maddox was present at the rally, but said he was not a participant.

During the rally, members of the crowd gave Nazi salutes – which they called "Roman salutes" – and shouted "white power."

Stoner, who also addressed the crowd at the start of the march, told the crowd at the courthouse that they had "won a great victory today."

"The only way you can keep love and peace and tranquility in Forsyth County is to keep those black savages out," he said.

During the rally, Dave Holland, grand dragon of the Southern White Knights of the Ku Klux Klan, attacked interracial marriage and MTV, predicted a race war, and called the city of Atlanta "a disgrace" to the state, country and world.



The march had been scheduled to start at 10 a.m., but did not get under way until about 10:45 a.m. Klan members and their supporters had begun gathering by 9 a.m. for a rally in a field across the road from the march's starting point.

At first, a carnival atmosphere prevailed, with members of the group making racial jokes as curious local people looked on.

More than half a dozen Confederate battle flags were waved and banners saying "Racial Purity in Forsyth County" were displayed. Stoner distributed leaflets headlined "Praise God for AIDS."

But once the marchers arrived, the crowd immediately turned mean. Law enforcement officers escorted the marchers' bus and several cars past the field where the Klansmen and their supporters were gathered, and the crowd of hecklers swarmed out of the field, leaping barbed wire fences. They caught up with the marchers as they got out of the bus.

The hecklers' ranks seemed to swell as they screamed taunts, threw peanuts and shadowed the line of marchers down the two-lane country road. The marchers walked two-by-two, keeping their bus and cars between themselves and the hecklers as a shield.

A line of Lawmen and State Patrol cars was also between the Klan crowd and the bus, trying to keep the hecklers from getting to the marchers.

Some of the hecklers ran ahead of the marchers, and others dropped behind. Outflanked at both ends, the outnumbered lawmen could not keep the crowd from

crossing the road and the march was surrounded with rocks and bottles coming from all directions. After the march, Williams stood in a small group of marchers alongside the bus while the riot-gear clad officers surrounded the group and kept away a small contingent of counterdemonstrators.

"I haven't seen racism any more sick than here today," Williams said. "The whole nation and the whole world will look at this."

He vowed to return to Forsyth County for future demonstrations. "This is not the end of marching in Forsyth County," he said.

---



## APPENDIX F

**Atlanta Journal and Constitution, January 25, 1987**

**THE MARCH IN FORSYTH COUNTY**
**Huge size of "army" stung foes**
By Bill Montgomery Staff Writer

CUMMING, Ga. – The people with the Confederate flags and the bitter handwritten signs denouncing Atlanta, blacks and race-mixing kept up noisy shouts and cheers throughout the day in a pep rally mood.

But the protesters fell into stunned silence when the marchers they had gathered to see came into view a hundred yards away, an awesome sea of blacks and whites stretching across Cumming's main street.

Shane Pruitt, a 16-year-old insulation company worker, leaned on the staff of the Confederate flag he was holding and blurted in a hushed tone: "God almighty, man, look at all those people."

Seconds later, he repeated his bewilderment at the size of the oncoming crowd marching for brotherhood and the right for blacks to live in all-white Forsyth County. As the civil rights marchers turned onto a side street in the courthouse square – a route that kept them a good block from their antagonists – Pruitt said, "Man, they're still coming. Look at that."

"They're invading our home like a foreign army," said a woman standing beside Pruitt. The heavy-set matron, who declined to identify herself, said she and her husband had moved here recently from Decatur because "we were persecuted by the blacks that kept moving into our neighborhood."

The number of white supremacists and their sympathizers fluctuated as people came and left throughout the day. But at their peak, more than 1,000 whites were assembled to protest the march.

The Confederate flags were waved, about 50 in all, some as big as beach blankets, others as tiny as postcards. A monkey doll hung from the pole of a banner carried by Jerry Lord, who said he was a member of the Forsyth County Defense League. Asked how many people were in the organization, Lord gestured toward the crowd and said, "As many as you see."

The white protesters ran the gamut from mothers with young children to teenagers to grizzled men in baseball caps. Many of the younger men wore camouflage fatigues, while others were attired in blue jeans and jackets over T-shirts advertising wine coolers, designer clothes and beer. At one point, four men who said they were members of the Invisible Empire Knights of the Ku Klux Klan, clad in plain white robes and pointed hoods, joined the group.

And a handful of young men, like Paul Stetar, a bearded 26-year-old welder from Athens and an avowed member of the National Socialist White People's Party, wore the Nazi swastika in various forms.

Stetar said he was not present at a biracial march last Saturday that was peppered with rocks and bottles by white supremacists. "I wished I was there, and I'm here now to demand the white people have the same rights as the niggers," he said.



The anti-civil rights protesters began gathering as early as 9 a.m. across Georgia Highway 9 from the Lanier Village shopping center, hours in advance of the scheduled arrival of the marchers.

Not all the crowd members waved flags or wore exotic regalia. Ray Jenkins, a construction worker from neighboring Dawson County, and his wife, Karen, said they were motivated partly by curiosity, though they readily said they did not want blacks living in their area.

"Cumming will let them blackscome [sic] through and work and eat here. But Hosea Williams wants to force them on us," Jenkins said.

Jenkins added that he was "in the front line" of last Saturday's counterdemonstration and shouted abuse at the marchers.

"I wanted to let them know they weren't welcome up here. That's why I'm here today. Where there's a lot of black people, there's a lot more crime. Statistics will tell you that," said Jenkins.

Reporters and camera crews clustered around Jerry Brown, a 26-year-old paraplegic waving three medium-sized American flags, two in one hand. Wearing a smudged Confederate Civil War-style forage cap, one leg twisted under the other in his wheelchair, Brown said his brother had been killed in Vietnam and that he had fought "the damn draft dodgers, Martin Luther King and those hippies who spit on our men when they came back."

Brown issued a stream of invective, including shots at Northern reporters – "New York, you can keep the

whole damn state," at blacks – "We believe in equal rights, but niggers want it all," and at the late Martin Luther King Jr. – "Thank God for James Earl Ray King's assassin."

Brown – a Forsyth County native who said he was crippled in a hunting accident in 1972 – was taken into custody later Saturday as he reacted angrily to the arrests of three white supremacist leaders during a rally near the courthouse, where the protester had moved.

Witnesses in the crowd said Brown screamed at Georgia Bureau of Investigation agents after the arrests of David Duke, Frank Shirley and another protest leader, calling the agents cowards and hypocrites. The blue-jacketed GBI agents lifted Brown's wheelchair by its armrests and carried it over the barricades as other agents pushed into the crowd to quell an angry response.

Brown's wife, Lori, her features twisted with rage screamed at the arresting officers that her husband "wasn't doing nothing but giving his opinion."

Anti-Black hand-lettered signs were plentiful throughout the protest group, several of them aimed at Atlanta City Councilman Hosea Williams and his history of traffic arrests. "Keep the blacks in Fulton County and out of sight," proclaimed one sign. "The snow is God's way of saying, 'Let's keep Forsyth County white, white,' " said another.

Many of the protesters, both men and women, wore on their clothing bumper stickers using a Valentine's Day heart to proclaim their love for white people.



Edward Fields, editor of the racist tabloid The Thunderbolt, and J.B. Stoner, a veteran anti-Semite and white supremacist recently released from prison after serving time in a 1958 Alabama church-bombing, were also in the crowd.

Fields told a cheering throng that last Saturday's violence began as "a peaceful Ku Klux Klan rally, and then Hosea Williams comes up with a busload of niggers and demands that they be dumped right in from of our rally. He instigated a riot to get all these people from up North down here."

Richard Barrett, a lawyer from Jackson, Miss., and onetime candidate for the Supreme Court of that state, told the crowd, "Martin Luther King was the past; Jesse Jackson has the present, but we, the white people of America, have the future."

As the whites roared their approval, a slender brunette standing with a gangly youth raised her head from his shoulder and kissed her boyfriend on the cheek.

---

**THE MARCH IN FORSYTH COUNTY**
**Soldiers of various stripes step forward for civil rights**
By Jim Auchmutey and Priscilla Painton Staff Writers

The group waiting in Cumming carried a sign that paid no heed to spelling: "Go Home, Niger." The group

walking into Cumming bore a placard from an alien culture: "The Klan: Drag Queens from Outer Space."

Separating them were more than 1,700 armed National Guardsmen, standing shoulder to shoulder, wearing combat helmets, camouflage and bulletproof vests. "It looks like a scene from a war movie," said Forsyth County resident David Hansen, 21, one of 75 who participated in last weekend's ill-fated brotherhood rally.

Those marchers, a thin stream of men, women and children outnumbered 4 to 1, were pelted with rocks and stones.

But this Saturday, a fleet of 175 buses deilvered [sic] at least nine demonstrators for each of Cumming's 2,100 townspeople. These marchers overcame with sheer numbers and celebrity.

As the column of 20,000 people wound down the narrow, guarded road into Cumming, ripples of recognition swept through the sea of onlookers. People nudged each other and pointed at Coretta Scott King. "Is that Jesse Jackson?" one woman asked in a stage whisper. It wasn't; he didn't show.

At first the marchers were quiet. Soon a few of them were singing a chorus of the old civil rights hymn, "Ain't Gonna Let Nobody Turn Me 'Round," until several march leaders turned around and shushed them. They wanted no provocation coming from their side.

One man in a Confederate cap sat videotaping the oncoming crush of humanity, and soon network TV crews were taping him taping.



One Cumming family stood on their front porch waving at the marchers, an American flag flying from their house.

One middle-aged couple shouted obscene racial epithets at the visitors as their small child watched expressionless on the hood of their car.

The marchers started mustering before dawn in downtown Atlanta along Auburn Avenue, the cradle of the civil rights movement. By 8 a.m. the street in front of Martin Luther King Jr.'s tomb was gridlocked with tour buses, taxis and hundreds of people clutching mufflers and placards reading "Black by Popular Demand."

They were an army as varied as any that ever mobilized for civil rights. There were spiked-hair punks as well as frizzy-haired boxing promoter Don King. There were 125 members of a San Francisco church as well as a Greek Orthodox abbot from Cleveland. There were duck shoes and down vests and souvenir sweatshirts – "I Was There in Cumming, GA." – that could be bought for $10.

Jesse Wineberry, a Washington state representative, jetted from Seattle. "If people can come across country to go to a football game, I figured I could head the other direction to march for freedom," he said.

Judy Gussler ferried a group from Columbus, Ohio, in her silver Ford mini-van. "In '63 I wanted to march with Dr. King to Washington," she said. "I never did, and, for me, maybe this makes up for it."

Rob Trawick, a Duke University sophomore, left Durham, N.C., Friday with three friends and drove all night in a rental car, arriving at the Atlanta Civic Center

staging area by 4 a.m. "Some of our friends thought we were kind of dumb to do this," he said. 'We're a little scared, but I have a credit card. I think they take those at hospitals."

Meanwhile, 40 miles north in Cumming, where the bright sun was beginning to melt a crunchy mantle of snow, the town seemed to be in hiding. Few downtown businesses were open, and "closed" signs were posted at most roadside establishments.

At the beginning of the parade route, 1.2 miles south of town, hundreds of people milled around the Lanier Plaza Shopping Center. Most of them were march sympathizers such as David Hansen, the veteran of the first rally. Surveying the gathering, he said, "This is just what the county needs. The more racismis [sic] exposed, the more we can get it out of here."

The actual rally at the courthouse lasted barely an hour, as a succession of politicians delivered some of their quickest speeches. More than a few black marchers expressed their desire to leave the scene before sundown – Guard or no Guard.

"To tell you the truth, I only see two men in Klan robes the whole time," said Atlantan Carmelita Williams, whose 8-year-old daughter, Desiree, roller-skated the march route.

Back in Atlanta, lounging on the cold tile floor of the Civic Center, Erin Edwards, a Tallahassee high school student, dined on a candy bar and marveled at the lack of violence. "I don't guess there's much you can do when about 20,000 Guardsmen are standing around."



"It's very easy to look at those people in Forsyth Countyas [sic] some sort of scaly, green-skinned monsters," said her bus mate, Betsy Parsons, a 28-year-old law student from Tallahassee. "But they're human beings too. That was the point of all this."

Perhaps some moment best captured this attitude Saturday afternoon. "We hate you, we hate you, we hate you," chanted white onlookers at the column of demonstrators.

"We love you, we love you, we love you," the marchers answered.

---

THE MARCH IN FORSYTH COUNTY
**20,000 march on Forsyth County**
**60 arrests mark day of tension,**
**1,000 turn out in counterprotest**
By Mike Christensen Staff Writer

CUMMING, Ga. – The civil rights movement came face-to-face with the remnants of Southern segregation here Saturday as 20,000 marchers for brotherhood encountered about 1,000 angry white protesters in the heart of Forsyth County.

The largest civil rights demonstration in two decades, more than one-third white and led by Coretta Scott King and civil rights veterans Hosea Williams, Joseph Lowery and Benjamin Hooks, poured into this largely rural

county that has gained a national reputation for intolerance following an attempted march last weekend that was cut short by violent anti-black protesters.

The opposition the marchers met this time was a mixture of local blue-collar workers, Ku Klux Klan members and other white supremacists who had come to this town just north of metro Atlanta.

Safeguarded by 3,000 state and local police and National Guardsmen, most of whom wore visored helmets and carried riot sticks, the marchers for brotherhood made their way over a mile-long route to the county courthouse past jeering crowds of whites waving Confederate flags.

Sporadic rock-throwing erupted at one street corner but was quickly broken up by Georgia Bureau of Investigation agents.

A wedge of blue-jacketed Georgia Bureau of Investigation agents and Guardsmen broke into the crowd of white protesters at one point in the march. Agents chased down one young man who spit on them, tackling him in the mud and shoving his face against a chainlink fence. He was led away with blood running from his nose.

One man in the march was hospitalized after being hit in the head by a brick, and a young woman was treated after she was struck with a metal pipe.

A black man received minor cuts when a group of whites smashed a concrete block into his car window after the march.

Police made 60 arrests, nearly all of them civil rights protesters, on charges ranging from obstructing a street



to incitement to riot, according to Forsyth County Sheriff Wesley Walraven, who walked with several deputies at the head of the march.

In contrast to civil rights demonstrations of two decades ago, most of those arrested Saturday were whites opposing civil rights rather than blacks demanding equality.

U.S. Sens. Sam Munn and Wyche Fowler accompanied Assistant Attorney General William Bradford Reynolds to the courthouse, and Reynolds later participated in the march. Former Sen. Gary Hart, Democratic presidential candidate, also attended.

Though Forsyth County government, civic and business leaders said they welcomed the marchers and denounced last week's incident in which 90 peace demonstrators were set upon by 400 whites, racial hatred pervaded the crowds hemmed into side streets around the courthouse square in Cumming.

"They said they were goin' to comé up here and rub it in our faces. Nobody don't rub notin' in my face," said Dennis Brock, a burly, bearded construction worker with a Confederate flag over his shoulder.

Brock said he had moved to Forsyth from West Atlanta to get away from blacks. "I done gone through this one time," he said.

The official pronouncement was that the march was peaceful. Civil rights organizations showed they could march through Forsyth County and not retreat.

But it was a joyless victory in an occupied country. By noon, Cumming was no longer a functioning community but an armed camp where deep hatred and deep commitment would face each other across a stern barrier of troops and police with the press as spectators.

Forsyth officials had asked local residents to stay home, and only a few ventured into town.

Williams, the Atlanta city councilman who had led the first march, said he would return to Forsyth County Sunday to attend church and later in the week to eat at local restaurants. He said he was not concerned about security.

"Jesus did not worry on Calvary, and Martin Luther King didn't worry in Memphis," he said.

The march began three hours later than planned as traffic jams delayed celebrity participants. It was not until 2 p.m. that the head of the column started down Old Buford Road behind a curtain of state troopers and Guardsmen.

By then, GBI agents had tried to pull the sting from the courthouse protesters by singling out and arresting several white supremacist leaders who had been haranguing the crowd through bullhorns.

Among the white demonstrators arrested were David Duke of Metairie, La., president of the National Association for the Advancement of White People, and one of his associates, Frank Shirley of Atlanta, who were charged with reckless conduct and blocking a state highway.

At times, the square was nearly silent.

When the head of the marching column appeared, it moved up the hill toward town at a slow, even pace, an



inexorable river of helmets and peace signs, raised hands and flashing visors.

The only sounds were the roar of helicopters overhead and the throbbing shouts of the counterdemonstrators, their Confederate flags rising and falling with their words.

As the leading ranks of marchers rounded the corner onto the square and the deep hatred of the crowd washed over them, the story of the day was written on their faces, a mixture of astonishment and fear, defiance and pity.

The protesters strained at the lines of police and Guardsmen, pouring out their invective in epithets now seldom heard publicly. The marchers stared back. Some raised their hands in "V" signs. A few took pictures as they walked. And then they were lost in the gathering crowd around the courthouse.

"We did not come to Forsyth County to scare you to death," Joseph Lowery, president of the Southern Christian Leadership Conference told the crowd. "We came to Forsyth to challenge you to live a life of decency."

Lowery then referred to the systematic ouster early this century of Forsyth County blacks in the wake of the rape and murder of a white woman and the lynching of her accused assailant. "In 1912, black people ran off and left some land as a good gesture," he said. "I believe that if you mean what you say, let's give those people money and and [sic] compensate them."

Speaking for local residents was Cumming Mayor Henry Ford Gravitt, who said, "I just want to welcome

you. This generation today can't help what happened 75 years ago. Let's start now and move forward."

"One week ago today, we had a group of people march here for brotherhood and a second group of people turned them away," said U.S. Sen.Sam [sic] Nunn (D-Ga.) "City officials, county officials want all of you to know that that second group does not speak for Forsyth County and does not speak for all of you."

Sen. Wyche Fowler urged the crowd to "eradicate from our hearts the prejudice that still lodges in America."

And John Lewis, a veteran of the civil rights movement who took Fowler's U.S. House seat, told the marchers, "I think by being here you are saying that we will not tolerate racism, not in Forsyth County, not in Georgia, not anywhere in this country."

By 4:30 p.m., the rally had ended. For two and a half hours, the crowd poured backed [sic] down the march route flanked by National Guardsmen as a State Patrol helicopter hovered overhead. Some 250 marchers were briefly stranded at a shopping center without buses, fearing the dark in Forsyth County.

---



## APPENDIX G

**Atlanta Constitution, February 4, 1987**

**Forsyth County march security cost $679,000**
**With $325,800 for National Guard,**
**state picked up biggest part of tab**
By W. Stevens Ricks Staff Writer

State and local law enforcement agencies incurred an estimated $679,148 in "extraordinary expenses" to provide security for the Jan. 24 "brotherhood" march in Forsyth County, according to figures released Tuesday by the governor's office.

The majority of the expenses were for state agency personnel, including an estimated $325,800 for the Georgia Army National Guard.

Gov. Joe Frank Harris, in a news conference Tuesday, said "cost was never a factor" in his decision to provide security for the civil rights march that attracted about 20,000 marchers and 1,200 counterdemonstrators.

"You had a large group of people that were converging on a very small town that had inadequate law enforcement to handle that many people," the governor said. "It's the same thing you do in any kind of an emergency situation. You handle it and then worry about the cost of it later."

The largest share of the expenses was borne by the state's militia, whose soldiers earned $267,900 in salary during their march duties. The remainder of the guard's expenses were: food, $29,800, fuel, $27,100; and medical expenses, $1,000.

Col. Harry Heath, spokesman for the state Defense Department, said the costs of the guard must be paid

from state funds since the governor called the 1,700 soldiers out for a state-related function.

The Georgia Bureau of Investigation, which provided 185 agents for the march, reported estimated expenses of $172,010, including $78,980 for overtime payments to agents. Director Robbie Hamrick said his agency also had to buy some new riot gear for the march.

The Georgia State Patrol spent an estimated $69,500 and the Department of Natural Resources, which lent a crew of conservation officers to the effort, predicted expenses of $11,838.

Forsyth County Sheriff Wesley Walraven told the governor's office that the cost of his deputies' services and officers provided by neighboring jurisdictions could amount to $100,000.

Included in those costs:

The Fulton County Sheriff's Department, which sent 50 deputies to the march, spent $18,260, according to Lt. George Arndt. The sheriff had to buy riot helmets and jump suits for the occasion, Arndt said.

Capt. John Watson, a spokesman for the Roswell police, said that agency spent $2,299 for the 14 people assigned to march.

Bob Hightower, Cobb County public safety director, estimated his department spent $700 in salaries for three intelligence agents in Cumming to monitor "terrorist group activity."



Randy Camp, a spokesman for the Cobb County Sheriff's Department, said about 30 deputies were loaned to Forsyth County at an estimated cost of $7,000 to $8,500.

Atlanta police and Forsyth County officials still were tabulating their costs this week and declined to release any figures. Neither the Gwinnett County Sheriff's Department nor Fulton County Police Department incurred extra budgetary expenses despite sending a total of 52 officers, officials said.

Meanwhile, the coalition of civil rights groups led by Atlanta City Councilman Hosea Williams still was considering a response to civic officials' agreement to establish a biracial committee.

The coalition is demanding restitution to families of blacks "unlawfully" forced from their land in the county 75 years ago, federal investigations to see whether there is housing and employment discrimination, and police efforts to ensure the safety of blacks who wish to work, travel or live in Forsyth County.

Williams said a letter from Forsyth County officials agreeing to the committee "doesn't mention our demands one time" and fails to spell out what actions the biracial group would take. He said the coalition would respond in writing before the weekend.

---

## APPENDIX H

FORSYTH COUNTY
ORDINANCE NUMBER 34

A RESOLUTION AND ORDINANCE
BY
THE BOARD OF COMMISSIONERS
OF FORSYTH COUNTY

A Resolution and Ordinance to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes; to provide an effective date; and, for other purposes.

WHEREAS the General Assembly of the State of Georgia passed an Act (Ga. Laws 1979, page 4001) which amended the Act (Ga. Laws 1964, Ex. Sess., page 2225) which created the Board of Commissioners of Forsyth County, Georgia, which amendment delegated the police powers of the State of Georgia to the Board of Commissioners of Forsyth County, Georgia, with respect to persons and property situated outside the territorial limits of any municipality in Forsyth County, Georgia, and expressly authorized and empowered said Board of Commissioners to make such rules and regulations respecting persons or property and all other things affecting the good government of the County as it shall deem requisite and proper for the security, welfare, health, and convenience of the County and for the preservation of the peace and good order of the same, and made the violation of any such rule, regulation, ordinance or resolution a misdemeanor punishable by a fine not to exceed $100.00



or by confinement in the County jail or correctional institution not to exceed three (3) months, either fine or imprisonment, or both, and made said violators amenable to the processes of the Superior Court of Forsyth County or the State Court of Forsyth County; and,

WHEREAS, the General Assembly of the State of Georgia passed an Act (Ga. Laws 1984, page 1086) adding to the Official Code of Georgia Section 36-1-20, which Section provides that the Board of Commissioners of Forsyth County, for the purpose of protecting and preserving the public health, safety, and welfare, is authorized to adopt ordinances for the governing and policing of the unincorporated areas of the County, violations of which ordinances may be punished by a fine not to exceed $500.00 or imprisonment for 60 days, or both, and conferring jurisdiction over violations of such ordinances in the Magistrate Court of Forsyth County, in addition to any jurisdiction which might be in the Superior Court of Forsyth County or the State Court of Forsyth County; and,

WHEREAS private organizations and groups of private persons have from time to time sought to use public property and public roads within the jurisdiction of the Board of Commissioners of Forsyth County for private purposes; and,

WHEREAS such uses have included parades, assemblies, demonstrations, road closings, and other related activities; and,

WHEREAS it is in the public interest that such uses not interfere unduly with the rights of citizens not participating therein nor endanger the public safety nor obstruct the orderly flow of traffic; and,

WHEREAS it is requisite and proper for the security, welfare, health and convenience of the citizens of Forsyth County, Georgia, and for the preservation of the peace and good order of said County that rules and regulations relating to parades, assemblies, demonstrations, road closings, and other related activities in the unincorporated areas of the County be established and that the violation of said rules and regulations be designated as a misdemeanor punishable as provided by law; and

WHEREAS the cost of necessary and reasonable protection of persons participating in or observing said parades, assemblies, demonstrations, road closings and other related activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible; and

WHEREAS the said cost of additional protection can be estimated by the County Administrator; and

WHEREAS the said estimated cost should be paid into an escrow account established by the Forsyth County Board of Commissioners prior to any such parade, assembly, demonstration, road closing, or other related activity, with the additional protection to be paid out of the escrow account and any surplus refunded to those sponsoring the parade, assembly, demonstration, road closing, or other related activity; and



WHEREAS the County Administrator should be empowered to designate reasonable sites and set reasonable time schedules for the beginning and end of parades, assemblies, demonstrations, road closings, and other related activities where more than one is applied for; and

WHEREAS the County Administrator should be empowered to cancel the permit for any parade, assembly, demonstration, road closing, or other related activity where the participants fail to appear and begin within a reasonable time of the time scheduled, based on other activities permitted or based on the unreasonable interference with the public welfare, peace, safety, health, good order, and convenience to the general public; and

WHEREAS the County Administrator should be empowered to coordinate all of his duties and decisions under this Resolution and Ordinance with the official designated by the City of Cumming and charged with the same duties and decisions as to parades, assemblies, demonstrations, road closings, and other related activities;

NOW THEREFORE BE IT RESOLVED AND ORDAINED by the Board of Commissioners of Forsyth County, Georgia, and it is hereby resolved and ordained by the authority of the same, as follows:

INDEX

Section 1. Definitions.

The following words where used in this Ordinance, unless the context requires otherwise, shall be deemed to have the following meanings:

(1) *Administrator*. The County Administrator shall be the administrator for the receipt and processing of applications for a permit for a private organization or group of private persons to hold a parade, assembly, demonstration, road closing, or other use of public property and roads for private purposes. The County Administrator may be assisted by other employees of the Board of Commissioners.

(2) *Private organization or group of private persons*. A private organization or group of persons shall be any firm, partnership, corporation, association, or group of individuals more than three in number, or their representatives, acting as a unit.



(3) Private purpose. A private purpose shall be any purpose not commanded or directed by statute, ordinance, or other regulation to be performed by the State, County, or other governmental entity.

Section 2. Permit required.

Every private organization or group of private persons who wishes to use public property or public roads in the unincorporated areas of Forsyth County for private purposes in holding a parade, assembly, demonstration, road closing, or other activity is hereby required to have a permit from the County for the privilege of engaging in any such activity within the County, unless such a permit is prohibited under State law or the activity is otherwise exempted by law, ordinance, or other valid regulation.

Section 3. Application; fee.

Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall submit an application for the permit to the administrator, which application shall conform to the requirements of this section in addition to any other provisions of this Ordinance.

(1) Unless otherwise provided herein, each application shall be a written statement upon forms provided by the administrator and submitted within a reasonable time prior to the planned activity, for security checks, verifications, and arrangements to be made, the administrator to act within fifteen (15) days of the receipt of the completed application.

(2) Each application shall contain the following information:

a. Name and home address of the applicant if an individual, or home office address if a corporation or partnership, and telephone where applicant maybe contacted;

b. Date, time and place where the proposed activity is to be carried on, including proposed routes of passage of parades or other proceedings.

c. Kind and class of activity to be carried on;

d. Names and home addresses of the partners, if a partnership;

e. Names and home addresses of the officers and directors, if a corporation;

f. Any additional information which the administrator may find reasonably necessary to the fair administration of this Ordinance, which may include a complete record of all arrests and convictions against the applicant and every partner, officer or director of the applicant for violations of any and all laws and ordinances of the County, State or federal government, other than minor traffic violations.

(3) Each application shall be signed and sworn to by the applicant if an individual, or by a partner if a partnership, or by an officer if a corporation.

(4) All information furnished or secured under the authority of this Ordinance shall be kept in strict confidence by the County; shall not be subject to public inspection; and shall be



utilized by the officers of the County responsible for administering the provisions of this Ordinance.

(5) False statements in any application for a license shall be grounds for immediate revocation of the permit, denial of the application and/or denial of future applications.

(6) Any application, permit and registration fees, as fixed from time to time by the Board of Commissioners, required under this Ordinance, shall accompany the application.

Section 4. Administration.

The administrator shall administer and enforce the provisions of this Ordinance for the application for and issuance of permits under this Ordinance.

Section 5. Duties of Administrator.

The administrator, or an authorized representative, shall have, among others, the following duties:

(1) To prepare and provide the necessary forms for the application for a permit and for the submission of any required information as may be necessary to property administer and enforce the provisions of this Ordinance.

(2) To review the application for completeness, collect whatever fee and escrow deposit may be required; to designate sites and set time schedules where more than one activity shall occur on the same day; to coordinate with City of Cumming authorities on all matters concerning said activities; and, where appropriate, to

receive the approval of the Department of Transportation, State Highway Patrol, and the Sheriff, or any other necessary public officer, for the requested activity.

(3) To issue to the private organization or group of private persons a permit within a reasonable time of such approval. The administrator may, however, where he deems it appropriate, defer the issuance of a permit until the application for the same shall have been approved by the Board of Commissioners.

Section 7. Procedure for issuance.

(a) If any provision of this Ordinance provides for the review of an application for a permit by a County officer designated therein, the administrator shall forward a copy of the application to that officer. The officer charged with the duty of reviewing the application shall make a recommendation thereon, favorable or otherwise, and shall return the recommendation to the administrator after receiving a copy of the application.

(b) Upon the receipt of the recommendation of the reviewing officer as hereinabove provided, or upon the receipt of the application if no reviewing officer is designated, the administrator shall take action upon the recommendation and application, although, in a proper case, he may refer the same to the Board of Commissioners for consideration and action at its next public meeting.

(c) Unless some significant interference with the rights of non-participating citizens exists, or the orderly flow of traffic would be obstructed unreasonably, or the



public safety be endangered, or there be other unreasonable interference with the public welfare, peace, safety, health, good order, and convenience of the general public, the permit shall be granted.

Where more than one permit is sought for the same date, the administrator shall have authority to designate reasonable sites and set time schedules for the beginning and ending of the activity. The administrator shall have authority to cancel the permit where the activity fails to begin within a reasonable time after the time set for it to begin, based on other activities for which permits have been granted or based on the unreasonable interference caused by such delay with the public welfare, peace, safety, health, good order and convenience to the general public.

(d) The administrator shall issue a permit to the applicant therefor, which permit shall state the nature of the activity authorized and bear the date of issuance and the signature of the administrator.

Section 8. Violations and penalties.

(a) Criminal offenses.

(1) Violation of Ordinance.

Any person who violates or fails to comply with any provision of this Ordinance shall be guilty of a misdemeanor, and shall be amenable to the processes of the Superior Court of Forsyth County, the State Court of Forsyth County, or the Magistrate Court of Forsyth County.

(2) Punishment for violations.

Any person or organization convicted of a misdemeanor for the violation of the terms of this Ordinance shall be punished by a fine not to exceed Five Hundred Dollars ($500.00), or by confinement in the County jail or correctional institution not to exceed three (3) months, either fine or confinement, or both, in the discretion of the Superior Court or the State Court, or by a fine not to exceed Five Hundred Dollars ($500.00), or by confinement in the County jail or correctional institution not to exceed sixty (60 days, either fine or confinement, or both, in the discretion of the Magistrate Court.

(b) Civil penalties.

Any person, being an officer or employee of Forsyth County, who shall violate any provision of this Ordinance may be discharged from public service or employment or be subjected to such other disciplinary action as may be appropriate.

Section 9. Defense to prosecution.

It shall be a defense to any prosecution under this Ordinance for failing to obtain a permit before engaging in any activity described in this Ordinance that a permit has in fact been issued in the manner provided by law. It shall be presumed that no permit has been issued unless, at his trial, the accused produces in court a valid permit or a certified copy thereof.



Section 10. Subsequent amendments; other fees.

This Ordinance shall be subject to amendment or repeal, in whole or in part, at any time, and no amendment or repeal shall be construed to deny the right of the County to assess, levy and collect any permit fees prescribed. The payment of any permit fee herein provided for shall not be construed as prohibiting the assessment, levy or collection of additional permit fees upon the same person, firm or corporation.

Section 11. Insurance and Indemnity.

(a) Prior to the issuance of any permit under this Ordinance, the administrator may require the execution of an indemnification or "hold harmless" agreement in favor of the County, its officers and employees, for any liability arising from the issuance of the permit.

(b) Where it reasonably appears to the administrator, or upon advice to that effect by the Sheriff, that other than routine police involvement will be necessary to assure the peace and good order of the County if the permitted activity is carried out, the administrator may require as a condition precedent to the issuance of the permit, that a deposit be made with him, in an amount necessary to reimburse the County for the extraordinary expenses occasioned by the permitted activity. If the private organization be other than individuals, a permit will not issue without the making of the necessary deposit; individuals may be excused from such a deposit on account of indigence upon the execution under oath by each individual in the group applying for the permit of a

pauper's affidavit. Prior to the receipt of such an affidavit the administrator shall advise the applicant orally or in writing of the penalties for the execution of a false document.

Section 12. Separability.

If any Section, sub-section, sentence, clause, phrase or any portion of this Ordinance be declared invalid or unconstitutional, such invalidity shall not be construed to affect the portions of this Ordinance not so held to be invalid, or the application of this Ordinance to other circumstances not so held to be invalid. It is hereby declared to be the intent of the Board of Commissioners to provide for separable and divisible parts and it does hereby adopt any and all parts hereof as may not be held invalid for any reason.

Section 13. Repealer provision.

Any resolution, ordinance, rule, regulation or other instruction previously approved by the Board of Commissioners or any other agency of Forsyth County which is inconsistent with the provisions of this Ordinance is repealed, revoked and shall be of no further force or effect upon the effective date of this Ordinance; but it is hereby provided that any resolution or law which may be applicable hereto and aid in carrying out and making effective the intent, purpose and provisions hereof, which shall be liberally construed to be in favor of Forsyth County, is hereby adopted as a part hereof.



Section 14. Effective date.

This Resolution and Ordinance shall be effective on the day of its adoption by the Board of Commissioners of Forsyth County.

This Resolution is hereby adopted this 27th day of January, 1987, the public health, safety and general welfare demanding it.

FORSYTH COUNTY ROAD
OF COMMISSIONERS

Attest: /s/ Betty Shadburn
Clerk

By: /s/ Leroy Hubbard
Chairman

/s/ David Gilbert
Commissioner

/s/ James Harrington, Jr.
Commissioner

/s/ Charles F. Welch
Commissioner

/s/ M. P. Bennett
Commissioner

A RESOLUTION AND ORDINANCE

BY

THE BOARD OF COMMISSIONERS OF FORSYTH COUNTY

A Resolution and Ordinance to amend Ordinance Number 34, adopted January 27, 1987, providing for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes, by amending Section 7 to provide for appeal from denial of a permit; by amending Section 11 thereof pertaining to insurance and indemnity; to provide an effective date; and, for other purposes.

WHEREAS the Board of Commissioners of Forsyth County adopted Ordinance Number 34 of January 27, 1987, such ordinance providing for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes; and,

WHEREAS Ordinance Number 34 provides in Section 11 thereof for insurance and indemnity; and,

WHEREAS, in a case in the U. S. District Court for the Northern District of Georgia, serious constitutional objections were found to an ordinance imposing restraints on the exercise of the freedom of assembly; and,

WHEREAS the Board of Commissioners intends that no unreasonable or unconstitutional restraints be place upon any citizen's right of assembly.



NOW THEREFORE BE IT RESOLVED AND ORDAINED by the Board of Commissioners of Forsyth County, Georgia, and it is hereby resolved and ordained by the authority of the same, as follows:

Section 1. Amendment of Index.

The Index of Ordinance Number 34 is amended by changing the title of Section 11 to "Deposits and Financial Responsibility."

Section 2. Amendment of Section 7.

Section 7 of Ordinance Number 34 is amended by adding thereto a new subsection (3), to provide as follows:

"(e) Any applicant whose application for a permit under this Ordinance is denied by the administrator may appeal such denial to the Board of Commissioners of Forsyth County, which shall consider such appeal at the regularly scheduled meeting next following the receipt of the applicant's appeal."

Section 3. Amendment of Section 11.

Section 11 of Ordinance Number 34 is amended by striking the present Section 11 and replacing it with the following:

Section 11. Deposits and Financial Responsibility.

"(a) Nothing in this Ordinance shall relieve any person or persons or organization from responsibility for any injuries or damages to persons or property, private or public, occasioned by their acts or omissions arising from the activity for which any permit under this Ordinance was issued.

"(b) After examining the application for a permit and receiving the advice and assistance of any other officer named herein, the administrator, after consideration of the facts reported in the application and any such advice and assistance from another public officer as herein provided, including prior experiences involving the same or similar activity, may require, as a condition precedent to the issuance of the permit, that a deposit be made with him, in an amount reasonably necessary to provide for, among other things, clean up after the event, special first aid or medical resources, security for vehicles at any staging area, special traffic considerations, temporary toilet facilities, and similar special and extraordinary expenses occasioned by the permitted activity.

"(c) If the private organization be other than individuals, a permit will not issue without the making of the necessary deposit; individuals may be excused from such a deposit on account of indigence upon the execution under oath, by each individual in the group applying for the permit, of a pauper's affidavit. Prior to the receipt of such an affidavit the administrator shall advise the applicant orally or in writing of the penalties for the execution of a false document."

Section 4. Forms.

(a) The form for a permit, applied for pursuant to the terms of Ordinance Number 34 is amended, on page 2 thereof, by deleting the question, "Have you read and signed the indemnity agreement?" and substituting in place thereof the question, "Do you understand that you may be held responsible for any damages or injuries to persons or property, private or public, occasioned by acts



or omissions attributable to you in the exercise of this permit?"

(b) The form for a permit, on page 2 thereof, is further amended by changing the word "the" to "any" in the question. "Have you paid the application fee?", so that when so amended the question shall read, "Have you paid any application fee?"

(c) In the next to last question in the form for a permit on page 2 thereof, the words "of law enforcement" are deleted.

Section 5. Effective date.

This Resolution and Ordinance shall be effective on the day of its adoption by the Board of Commissioners of Forsyth County.

This Resolution is hereby adopted this 23rd day of February, 1987, the public health, safety and general welfare demanding it.

FORSYTH COUNTY BOARD
OF COMMISSIONERS

Attest: Betty Shadburn
Clerk

By: /s/ Leroy Hubbard
Chairman

/s/ David Gilbert
Vice Chairman

/s/ James Harrington
Secretary

/s/ Charles F. Welch
Commissioner

/s/ M.P. Bennett
Commissioner

This is to certify that this is a true and correct copy of the amendment to Ordinance #34, adopted by the Forsyth County Board of Commissioners on February 23, 1987.

/s/ Betty Shadburn
Clerk

---



A RESOLUTION AND ORDINANCE
BY THE
BOARD OF COMMISSIONERS
OF FORSYTH COUNTY

A Resolution and Ordinance to amend Ordinance Number 34, adopted January 27, 1987, and amended February 23, 1987, providing for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes, by amending Section 3 to provide for administrative action within ten days of receipt of an application, a maximum license fee and exemptions for indigency; by amending Section 7 to provide for procedures for appeal from a denial of a permit and to prohibit certain activities on the Courthouse grounds at all times and to prohibit all activities on the Courthouse grounds at certain times; by amending Section 11 pertaining to deposits and financial responsibility; to provide an effective date; and, for other purposes.

WHEREAS the Board of Commissioners of Forsyth County adopted Ordinance Number 34 of January 27, 1987, and amended said Ordinance on February 23, 1987, such ordinance providing for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes; and,

WHEREAS Ordinance Number 34 provides in Section 3 for payment of application, permit and registration fee; and,

WHEREAS Ordinance Number 34 provides in Section 11 for deposits and financial responsibility; and,

WHEREAS the Board of Commissioners wishes to restrict interference with the administration of justice on the Forsyth County Courthouse grounds and to minimize the likelihood of interference with the rights of nonparticipating citizens residing in close proximity to the Forsyth County Courthouse; and,

WHEREAS in a case in the United States District Court for the Northern District of Georgia, in which Forsyth County and its Board of Commissioners is a party, serious constitutional objections have been raised to Ordinance Number 34, specifically the fee aspects of Section 3 and the deposit requirements of Section 11; and,

WHEREAS the Board of Commissioners intends that no unreasonable or unconstitutional restraints be placed upon any citizens' right of expression.

NOW THEREFORE BE IT RESOLVED AND ORDAINED by the Board of Commissioners of Forsyth County, Georgia, and it is hereby resolved and ordained by the authority of the same, as follows:

Section 1. Amendment of Index.

The index of Ordinance Number 34 is amended by changing the title of Section 11 to "Financial Responsibility."

Section 2. Amendment of Section 3.

Section 3 of Ordinance Number 34 is amended by changing the word and number "fifteen (15)" in subsection (1) to "ten (10)" so that subsection (1) now reads as follows:



"(1) Unless otherwise provided herein, each application shall be a written statement upon forms provided by the administrator and submitted within a reasonable time prior to the planned activity, for security checks, verifications, and arrangements to be made, the administrator to act within ten (10) days of the receipt of the completed application."

Section 3 of Ordinance Number 34 is further amended by striking the present subsection (6) and replacing it with the following:

"(6) Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed. In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax."

Section 3 of Ordinance Number 34 is further amended by adding after the aforementioned subsection (6) subsection (7) which shall read as follows:

"(7) If the private organization be other than individuals, a permit will not issue without the paying of the necessary fee; individuals may be excused from such a deposit on account of indigence upon the execution under oath, by each individual in the group applying for the permit, of a pauper's affidavit. Prior to the receipt of

such an affidavit the Administrator shall advise the applicant orally or in writing of the penalties for the execution of a false document."

Section 3. Amendment of Section 7.

Section 7 of Ordinance Number 34 is amended by adding the following paragraph after the first paragraph of subsection (c):

"As a condition to issuing a permit, the Administrator may require the private organization or group of private persons to provide personnel for trash clean-up of affected areas littered during the activity for which a permit is sought, the provision of first aid and medical resources if considered necessary by the administrator, proof of sufficient storage areas for a large influx of motor vehicles occasioned by the permitted activity, provision of temporary toilet facilities and other similar special and extraordinary items considered to be necessary for the permitted activity in the opinion of the Administrator, based on his past experience with such activities and his coordination with other County, City and State officials. In no event shall the Administrator require private organizations or groups of private persons to provide personnel for normal governmental functions, such as traffic control and police protection. If additional requirements are placed on private organizations or groups of private persons in accordance with this sub paragraph, and those requirements are not met despite assurances by said private organization or group of private persons, then said failure to comply with the aforementioned requirements shall be grounds for denial of



any subsequent permit requested by said private organization or group of private persons and for any other claims for funds expended by the County for those extraordinary expenses agreed to but not provided by the applicant."

Section 7 of Ordinance Number 34 is further amended by striking the present subsection (e) of Section 7 and replacing it with the following:

"(e) Any applicant whose application for a permit under this Ordinance is denied by the Administrator may appeal such denial to the Board of Commissioners of Forsyth County, which shall consider such appeal at the regularly scheduled meeting next following the receipt of the applicant's appeal, if applicant has submitted said appeal by the day items are to be placed on the agenda in accordance with normal procedures of the Board of Commissioners of Forsyth County. In the event an applicant fails to appeal before the agenda is prepared, he may nevertheless be heard at the next regularly scheduled meeting of the Board of Commissioners if he has provided each of the Commissioners a copy of the application which he submitted to the Administrator and the reasons given by the Administrator for the denial not less than twenty four (24) hours prior to the regularly scheduled meeting of the Board of Commissioners. The Board of Commissioners shall consider the appeal by requiring the Administrator to explain why the permit was denied. Unless the Administrator can show significant interference with the rights of non-participating citizens; an unreasonable obstruction of the orderly flow of traffic; a clear and present endangerment to citizens of Forsyth County; other specific unreasonable interference with the

public welfare, peace, safety, health, good order, and convenience of the general public, or failure to comply with the dictates of ordinance Number 34, the permit shall be granted."

Section 7 of Ordinance Number 34 is further amended by adding thereto a new subsection (f) to provide as follows:

"(f) In no event shall any private organization or group of private persons be permitted to bring signs, banners, posters, leaflets, handbills or any other printed material of any size or shape containing any message intended to influence any judge, juror, witness, or court officer, in the discharge of his duty at the Forsyth County Courthouse and the grounds upon which it stands. No private organization or group of private persons may use the Forsyth County Courthouse grounds for private purposes in holding a parade, assembly, demonstration, or other activity on any non-holiday weekday, prior to 8:00 a.m. or after 5:00 p.m. on any Saturday or public holiday, or prior to 1:00 p.m. nor after 5:00 p.m. on any Sunday."

Section 3. Amendment of Section 11.

Section 11 of Ordinance Number 34 is amended by eliminating the words "deposits and" from the title and by eliminating the subparagraph designation "(a)" and all of subsections (b) and (c).

Section 4. Effective Date.

This resolution and Ordinance shall be effective on the day of its adoption by the Board of Commissioners of Forsyth County.



This resolution is hereby adopted this 8th day of June, 1987, the public health, safety and general welfare demanding it.

FORSYTH COUNTY BOARD
OF COMMISSIONERS
By: /s/ Leroy Hubbard
Chairman

Attest: Betty Shadburn
Clerk

/s/ David Gilbert
Commissioner

/s/ James Harrington
Commissioner

/s/ M.P. Bennett
Commissioner

/s/ Charles F. Welch
Commissioner

This is to certify that this is a true and correct copy of Ordinance #34, Amendment #2, adopted by the Forsyth County Board of Commissioners on June 8, 1987.

/s/ Betty Shadburn
Betty Shadburn, Clerk

ORDINANCE #48

A RESOLUTION AND ORDINANCE
BY THE
BOARD OF COMMISSIONERS
OF
FORSYTH COUNTY, GEORGIA

A resolution and ordinance to amend Ordinance Number 34, adopted January 27, 1987, and amended February 23, 1987, and June 8, 1987, providing for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes, by amending Section 3 to provide a time before which applications will not be accepted; to provide an effective date; and, for other purposes.

WHEREAS, the Board of Commissioners of Forsyth County adopted Ordinance Number 34 of January 27, 1987, such ordinance providing for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes; and,

WHEREAS, there is no specific time limitation in that Ordinance providing for a time before which applications for permits will not be accepted; and,

WHEREAS, the Board of Commissioners intends that proper consideration be given to all applications for permits but that those applications can only be properly considered if they are made reasonably close to the time in which an activity requiring a permit is to occur; and,



WHEREAS, the Board of Commissioners finds that without a specific restriction on the time in which applications may be submitted for consideration the possibility of abuse of the permit procedure may occur by applications for permits for activities being submitted years in advance,

NOW THEREFORE BE IT RESOLVED AND ORDAINED by the Board of Commissioners of Forsyth County, Georgia, and it is hereby resolved and ordained by the authority of the same, as follows:

Section 1. Amendment of Section 3.

Section 3 of Ordinance Number 34 is amended by adding at the end of Subsection (1) the following sentence: "The phrase 'reasonable time prior to the planned activity' shall be construed to mean not more than sixty (60) days prior to the planned activity."

Section 2. Effective Date.

This Resolution and Ordinance shall be effective on the day of its adoption by the Board of Commissioners of Forsyth County.

This Resolution is hereby adopted this 25 day of April, 1987, the public health, safety and general welfare demanding it.

FORSYTH COUNTY BOARD
OF COMMISSIONERS

By: /s/ Charles F. Welch
Chairman

Attest: Betty Shadburn
Clerk

/s/ Leroy Hubbard
Commissioner

/s/ M.P. Bennett
Commissioner

/s/ James Harrington
Commissioner

/s/ David Gilbert
Commissioner

This is to certify that this is a true and correct copy of the amendment to Ordinance #48, adopted by the Forsyth County Board of Commissioners on April 25, 1987 as Amendment #3 to Ordinance #34.

/s/ Betty Shadburn
Clerk

---



**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
GEORGIA GAINESVILLE DIVISION

| | | |
|---|---|---|
| FORSYTH COUNTY DEFENSE LEAGUE, and MRS. BEVERLY WATTS | : | CIVIL NO. C-87-31-G |
| VERSUS | : | FILED MAR 13 1987 |
| CITY OF CUMMING and FORSYTH COUNTY | : | |

ORDER

Pending before the court in the captioned case is a motion for injunction. The court ruled upon that matter in open court on Thursday, March 12, 1987. For the reasons stated during the ruling from the bench, and in a written opinion to be filed in this case, the court has granted in part and denied in part the plaintiff's motion for an injunction. The injunction as to the City of Cumming is hereby denied for the reasons stated by the court from the bench. Likewise, for the reasons stated, the injunction as it relates to Forsyth County, Georgia, has been granted.

Forsyth County, its officers, agents, servants, employees, attorneys and all other persons in active concert or participation with them, are hereby enjoined and restrained from preventing *a public rally and the exercise of speech by the plaintiff and those persons engaged with her at such rally on the grounds of the Forsyth County Courthouse in*

*Cumming, Georgia on Saturday, March 14, 1987.* The defendant Forsyth County shall allow such rally, assembly and speeches for a period not to exceed two hours between 3:00 and 5:00 p.m. on Saturday, March 14, 1987.

This injunction does not prevent or preclude the defendants and properly designated law enforcement officers from maintaining law and order and enforcing the laws of the State of Georgia, including traffic control on the public streets in the City of Cumming, including the streets surrounding the courthouse.

This injunction does not include the right to amplify speeches and/or other sounds to such a degree as to disturb the residents and visitors of the convalescent home across the street from the courthouse and/or the business and other facilities surrounding the forsyth County courthouse.

The plaintiff and her supporters and participants have been denied the right to conduct a parade as requested in this law suit; however, the right of assembly and speeches on the courthouse grounds is to be fully afforded to them in accordance with the terms of this order.

IT IS SO ORDERED this 13th day of March, 1987.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

---



**APPENDIX J**

BULLETIN OF
Forsyth County Defense League
"ALL THE WAY"

---

JULY 9, 1987

---

**NEW CHARTER**

*On June 26, 1987, The Forsyth County Defense League received its new Charter from the Nationalist Movement as an independent affiliate.* We now enjoy the protections used by our adversaries . . . and we shall use our rights to advance our freedom!

**ILLEGALS**

Illegal aliens reportedly are in or around Forsyth County. If you know where any of these undesirables live or who they work for, pass along this information to us.

**TOP COUNTY IN THE WORLD**

Forsyth County, Georgia, is now the best-known county in the world. Because red-white-and-blue working people dared to defend their rights here. Ours is the voice heard, round the earth! A new campaign has begun to mail to potential supporters. It costs a lot for postage, but its little compared to the price Nathan Hale, John Paul Jones and Patrick Henry paid for liberty.

## T-SHIRTS

T-shirts promised by manufacturer two weeks ago have been delayed again. New producer should have then ready shortly. Orders yours now and wear it proudly (4-colors on olive background. Super-looking).

## BI-RACIAL RASCALS ON RUN

The Mulatto (Bi-Racial) Committee says it will wind up its dirty dealing soon. It does not want to credit the FCDL with putting it out of business, but we all know who are the main opponents of Hosea Williams and his gang. And we know who welcomed the black power oppressors to Forsyth County. By the way, Mayor Gravitt, where's that apology for calling patriots "white trash"?

## ANOTHER LEGAL VICTORY

Forsyth County tried again (and lost) to have the FCDL suit against it thrown out of federal court. County lawyer Bob Stubbs told Judge William O'Kelley that Forsyth County had reached an agreement with the ACLU to end the suit. Only he didn't ask the people. The ACLU doesn't vote here. Work here. Or live here. How 'bout minding the words, "We the People," Mr. Commissioner?

## HARDING WINS FIRST ROUND

*Your Chairman, Jim Harding, went head-to-head with left-wing lawyer Morris Dees here at the Courthouse recently.* And didn't blink or back down. Dees is trying to sue patriots



who opposed invaders' January 17th demands to confiscate Forsyth County land and give it to NAACP-types. No way, Hosea!

## DEFEAT DEES

Morris Dees, who was Gary Hart's chief fund-raiser, has been attacking your League on national television. The harder his attacks, the more friends for us! Don't forget the new slogan (and mean it when you shout it): "Defeat Dees" – "Free Forsyth".

## NEW PARADE

Plans are in the works for a Labor Day Parade and Rally in Cumming. It will be our "Majority Jubilee." Plan to celebrate your victory over tyranny. Can you be a parade marshal? We need your name and support.

## POSTERS

A spectacular poster is being designed to picture those arrested for protesting the Black Power Invasion, together with your own Nationalist leaders. Let us know if you would like to be pictured and send a photo.

## KNOW YOUR RIGHTS

Your FCDL is publishing information on how to qualify to run for office and to protect your rights. While we are non-partisan and non-political, we want you to know what you can do to change things for the better. Ask for these facts and consider being a candidate, yourself.

## BOOSTERS' BANQUET

Like to eat? Then you will want to attend the Banquet honoring those Sons of Liberty acquitted or charged for defending the American Way of Life. Make your reservations soon. The date will be announced. Nobody loves the Constitution more than you. Nobody serves the nation better than you.

## DISSIDENTS TURNED BACK

A back-biter and his handful of former League members tried to halt your progress last month. They convinced themselves they could stop your growth throughout the nation. Instead, these Weeping Willows and Nervous Nellies encountered the largest turnout yet for your Courthouse meetings. And they were voted out overwhelmingly.

## LUNDIN, SHIRLEY LEAD THE WAY

Swedish Nationalist and Youth Leader, Dennis Lundin, addressed the League at the last meeting. He came just to thank Forsyth County for standing up for freedom . . . and he called for unity of nationalists of Northern Europe, America and South Africa. Frank Shirley pounded our adversaries with his usual thrilling oratory. Don't forget, League meetings are each second Thursday at the Forsyth County Courthouse, 7:30 PM sharp.

## HEADQUARTERS OR BUST

We must have a headquarters in the Atlanta area. Can you donate a commercial building, house or anything? It will be staffed and run professionally, as soon as



possible. Can you give some land? Freedom is not free . . . the price must be paid! We also need staff people. Can you give a few hours or days a week? Do you have room for speakers, visitors or supporters visiting our meetings to stay? Let us know now.

## NEWSLETTER IN WORKS

We need help in putting out the new news letter. Membership cards and emblems are also coming . . . please be patient. And pay your dues. Send your pledge. Also planned are leather goods with the Crosstar Victory emblem and Crosstar flags of the Movement. A booklist will be published soon, too, for your advancement.

## YOUTH CORPS

New Youth Corps leadership will be announced shortly. If you are a youth member or student, join this important force for the New America. "Nationalism Now!"

---

NAME _____ ADDRESS _____

CITY _____ STATE ___ ZIP ___ PHONE _____

I need _____ Comments _____

JOIN & SUPPORT YOUR:

Forsyth County Defense League
PO Box 1321 / Cumming, Georgia 30130

---

**APPENDIX K**

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

---

NO. 88-8093

---

FORSYTH COUNTY DEFENSE LEAGUE — APPELLANT

VS.

FORSYTH COUNTY, GEORGIA — APPELLEE

---

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF GEORGIA GAINESVILLE DIVISION

---

BRIEF OF APPELLANT
FORSYTH COUNTY DEFENSE LEAGUE

---

RICHARD BARRETT
PO Box 6700
Jackson MS 39212
(601) 373-4400

ATTORNEY FOR APPELLANT

* * *



## STATEMENT OF THE CASE

On March 9, 1987, the League and Mrs. Beverly Watts filed suit in the U.S. District Court, Northern District of Georgia, Gainesville Division [R. §1], against the City of Cumming and Forsyth County, Georgia, under 42 *U.S.C.* §§1983, 1985 and 1988 to redress denial of free speech and assembly. A motion for a temporary restraining order [R. §3] under *Rule 65, F.R.C.P.* was also filed.

On March 13, 1987, Judge O'Kelley granted relief to the League and Mrs. Watts [R. §§ 6, 7] enjoining the County from interfering with the conduct of a rally by the League and Mrs. Watts. On October 5, 1987, the parties dismissed the City without prejudice by stipulation [R. §18]. On October 5, 1987, the Court dismissed the action as moot, except as to attorney fees [R. §19].

On October 17, 1987, the League filed its motion for an additional thirty days within which to file its motion for attorney fees [R. §20]. On October 23, 1988, the County filed an objection [R. §21]. On October 28, 1988, the League filed its response to the County's objection [R. §23] and, also, its motion for attorney fees [R. V. 2 §22].

On November 16, 1988, Judge O'Kelley denied the League's motion for attorney fees as not timely filed and dismissed the League's motion to extend time as moot [R. §25]. On November 23, 1987, the League and Mrs. Watts requested reconsideration of and relief from Judge O'Kelley's November 16th order [R. §26].

*On December 6, 1987, the League moved to amend to reflect its corporate status under its parent, The Nationalist*

*Movement, a Georgia non-profit corporation*, and to secure a declaration of pauper status [R. §27].

On January 19, 1988, Judge O'Kelley denied reconsideration of or relief from his November 16th order, denied as moot the request to reflect the corporate status of the League and denied as not ripe the declaration of pauper status [R. §32].

On February 6, 1988, the League appealed [R. §34], also re-submitting its motion for pauper status [R. §35]. On February 25, 1988, Judge O'Kelley denied the pauper status [R. §38] on grounds that finances of individual League members were not disclosed.

On February 29, 1988, the League filed its motion in this Court, pursuant to *Rule 24(a), F.R.A.P.*, requesting pauper status, also objecting to disclosure of its membership. On March 4, 1988, the County filed a response contending that League's parent corporation had not submitted an affidavit of

* * *



## APPENDIX L

**Atlanta Journal and Constitution, March 15, 1987**

**Cumming rally peaceful**
**'White rights' runs up against counterprotest**
By Ron Taylor Staff Writer

CUMMING, Ga. – White supremacists staging a "Majority Rights' Freedom Rally" here Saturday were outnumbered by members of local church groups who stood across the street and held up red-lettered signs saying "Go Home."

Forsyth County Sheriff Wesley Walraven estimated the number of participants in the "white rights" rally at about 125. But the white church members who staged a brief counterprotest numbered about 200, he said.

To maintain the peace, Walraven had stationed 11 patrol cars in front of the courthouse square where the rally was held. Also on hand were nearly 100 helmeted deputies, state patrolmen, GBI agents and local policemen, who lined three sides of the square.

No incidents of violence occurred, the sheriff said, and the only arrest made was not directly related to the protest. A motorist was arrested on a street next to the courthouse and charged with driving under the influence, possession of a weapon by a convicted felon and parole violation, according to Walraven.

"We're kind of tired of all this," said Bob Ross, referring to a string of racial protests and counterdemonstrations in the county over the past two months.

Ross came to the counterdemonstration with his wife, Teresa, and their two children Amanda, 2, and Brooks, 5.

They were among forces rallied by representatives of 15 Forsyth County churches.

"The pastors here have taken a stand and asked the members of their churches to stand up for Jesus and what's right," said George Dalusky, a member of Cumming United Methodist Church.

Most of the church members had left, however, by the time leaders of the "white rights" rally had begun to stir their forces into chants of "No way, Hosea" and other cries against leaders of previous racial protests here.

Hosea Williams, an Atlanta city councilman and civil rights veteran, led the first protest here in January, which ended in violence when Ku Klux Klansmen and their sympathizers began hurling rocks and bottles at the marchers.

A week later, about 20,000 marchers came to the virtually all-white county to protest that attack.

Leaders of Saturday's rally directed their speeches at a multitude of working-class fears, conjuring up images of an America overrun by foreign immigrants and doomed to suppression by communists.

"Our borders are being inundated by colored immigration," said Frank Shirley, information director for the Forsyth County Defense League, which sponsored the rally. "What is needed is to mine the Mexican border. What is needed is to send an army to the border, and anybody who comes across should be treated as spies."

The crowd responded with cheers and upraised fists.

Shirley also lambasted the local Chamber of Commerce, which had condemned the white supremacists,



calling its members "a bunch of rich liberals and race traders."

Also appearing at the rally was Mississippi attorney Richard Barrett, who called for abolition of the county's biracial commission, describing it as a tool of "invaders."

Walraven said he would rather have spent Saturday fishing. "My hope is that these people coming here will begin to just say what they want to say and go home and not mess up our Saturdays anymore," the sheriff said.

---

## APPENDIX M

**Atlanta Journal and Constitution, January 17, 1988**

**175 march peaceably in Forsyth**
By Monte Plott and Sandra McIntosh Staff Writers

About 175 civil rights marchers accomplished Saturday what a similar group couldn't do a year ago – they walked unhindered down a Forsyth County road.

Law enforcement officers outnumbered marchers by a ratio of 2-to-1, and counter-demonstrators were kept off the two-mile march route to prevent a recurrence of violence that halted a "brotherhood" march in the predominantly white county last Jan. 17.

That led to the biggest civil rights march of the decade a week later.

This time, there were no rocks or bottles thrown at marchers, and few spectators on hand. There were no arrests, authorities said.

"I want to congratulate the state police and Forsyth County Sheriff Wesley Walraven," said Atlanta City Councilman Hosea Williams, who organized the march to commemorate last year's demonstration. "This was a beautiful march without a bit of trouble, and I know we have them to thank for that."

Police saw to it ahead of time that most of the land along the route was posted off limits to any spectators. The only ones to witness the march were a few people who came out of their houses, the army of more than 400 officers from local, state and federal agencies, and a crowd of journalists about equal in size to the racially mixed group marching.



At the first march last January, police were overwhelmed when angry whites threw rocks and bottles at a group of 75 civil rights marchers. But this year, "we wanted to make sure we had no possible places where demonstrators could gather," Walraven said. "We set out to prevent a violent demonstration."

To do that, Walraven said state and local officials met with residents along the parade route, almost all of whom agreed to turn over a limited power of attorney to the Georgia Bureau of Investigation (GBI) for the day.

That authority, said GBI Director Robbie Hamrick, gave officials power to arrest anyone who trespassed on private property during the march.

A group of white extremists – including representatives of the Ku Klux Klan and the Crusade Against Corruption – gathered outside a small market across from barricades police erected in front of the march's starting point. Although some of the extremists waved Confederate battle flags as the buses drove into the march area and police watched warily, there were no incidents.

Another group of about 68 flag-waving counter-demonstrators – including two men wearing Nazi garb – rallied on a privately owned lot, waiting under the gaze of about a dozen officers for marchers they never saw.

Mississippi Lawyer Richard Barrett, an organizer of the white supremacist Forsyth County Defense League, told the crowd that the three buses taking Williams' marchers home in the afternoon would be coming right by them.

"Hold your tempers, but not your tongues," Barrett urged his followers. But there was no confrontation – the group was more than a quarter mile from the actual march route, and buses carrying the marchers left the area on a different route.

Williams and his followers said they had come back to Forsyth County to finish last year's march – despite a second march last Jan. 24 that brought 20,000 protesters to the county and put a national spotlight on Forsyth County.

"This is for the younger kids," said Jacquelyn Harris of Atlanta. "Hopefully one day they won't have to go through what we did."

"They have made some improvements in Forsyth County since last year," Williams said. "but it isn't enough, and we're here to tell them if they don't do right, we'll return with 20,000 marchers again."

March leaders continually urged their singing and chanting followers to remain calm and non-violent. The march captains even collected from participants such items as pen knives, nail files, large belt buckles and a corkscrew.

The group came prepared with a truckload of signs, many proclaiming the march's slogan: "Redeeming the Soul of Forsyth." Others said "We are back to complete what we started a year ago," "It is time for Forsyth to join America" and "Ain't gonna let nobody turn us around."

Officials began the groundwork early for securing the area.



By 8 a.m. Saturday, police had already sealed off the entrances to the march, and officers were combing the wooded hills along the route.

As the marchers drove through heavily manned police barricades early Saturday, they were met by rows of officers from the Georgia State Patrol, the Department of Transportation, the Department of Natural Resources (DNR), the Department of Corrections and the GBI. Federal Department of Justice officials were also on hand, as was virtually the entire Forsyth County Sheriff's Department and a small group from the county fire department.

DNR officers on small four-wheel, all-terrain vehicles led the band of marchers along the route. The group was flanked by helmeted State Patrol officers, the sun glinting off their face plates.

Two helicopters circled continuously, checking on the marchers and looking for movement along the route.

Other officers and reporters walked with the marchers along the route that wound through a hilly wooded area dotted with ponds and pastures. The only others to watch were residents of the houses and trailers scattered along the parade route.

---

## APPENDIX N

**Atlanta Journal and Constitution, January 24, 1988**

**65 show up for march in Cumming**
By Sandra McIntosh Staff Writer

CUMMING – About 65 demonstrators, 40 of them draped in Ku Klux Klan robes, marched without incident Saturday from the Forsyth County High School to the County Courthouse for a 1 1/2-hour "white power" rally.

Richard Barrett, a Jackson, Miss., lawyer and a founder of the Forsyth County Defense League – a group dedicated to keeping blacks out of the county – led the group along the one-mile route in downtown Cumming.

It was a response to a march by about 175 people led through the virtually all-white county last Saturday by Atlanta City Councilman Hosea Williams. That march commemorated events that propelled Forsyth County to international prominence a year ago, when a small civil rights demonstration was broken up by white supremacists, resulting in a march by 20,000 people – the largest civil rights march of the decade – a week later.

"It's time for the white people of America to stand up and tell the blacks that we will not allow them to run this country and we will not allow them to run us," Barrett shouted over his bullhorn Saturday as the marchers prepared to assemble.

The half-hour march went without incident, officers said, although there was a brief confrontation with police when the marchers reached the courthouse. Police had cordoned off the parking spaces in front of the courthouse for the demonstration, but the marchers demanded



the entire street be closed, shouting "You closed it for Hosea, now close it for us."

Cumming Police Chief Wayne Lindsay called for State Patrol backup, but the the demonstrators returned to the parking area before troopers arrived. Lindsey said he couldn't allow the marchers in the street because they had not requested it in their permit.

Police estimated the crowd at the courthouse at slightly less then 100. About 45 police officers, 20 from the state, were on hand.

There were few spectators. Joe Caldwell of Hall County and two of his friends sat in a pickup watching the demonstrators. The three were on dinner break and "came out to see the fool show," Caldwell said.

"All this does is give everyone up here a bunch of bad publicity," Caldwell said, "It's ridiculous."

But Bertie Collins, whose husband left the sidelines to join the marchers, said she hoped the demonstrators would help keep blacks out of the county.

"I think the blacks ought to stay in their place," Mrs. Collins said. "We don't go down to Atlanta and bother them, so why should they come up here and bother us?"

The marchers carried signs and banners with such slogans as "The Black Man's Dream Is the White Man's Death," "No King Over Us," and "Majority Not Minority Rule."

Buck Jones, the city assistant chief of police, said not many of the marchers were from the county.

"Very few of these people are local," he said, nodding toward the marchers. "I don't recognize more than 10 or 15 of them."

A quick scan of the high school parking lot showed license plates from Minnesota, Alabama, South Carolina, Illinois and Mississippi. Only four of 34 vehicles in the school parking lot carried Forsyth County tags.

After the march, Chief Lindsey and a spokesman for the GBI said there were no arrests and no injuries.

Johnny and Maria Fonticiella, who have lived in Cumming for two years and in the United States for six, seemed confused by the demonstration.

"What do they want," Mrs. Fonticiella, a native of Caracas, Venezuela, asked a bystander. When it was explained to the couple, Mr. Fonticiella shook his head.

"In this day and age, in almost the 21st century, this is stupid," he said, as his wife added, "In our country we have all colors living together, and we don't have this."

---



## APPENDIX O

5/11/88 Review letter from Beau Stubbs dated 5/9/88 to Joe McNamee in reference to postponement of Assembly Application.

Forsyth Co.
DEFENDANT'S
EXHIBIT
FC-2 ADMITTED
C89-06-WCO

5/12/88 Review letter from Joe McNamee dated 5/9/88 in reference to appeal to Board of Commissioners.

6/07/88 Reviewed letter from Joe McNamee dated 6/3/88 to Ralph Roberts in reference to denial (postponement) of permit for assembly and request for appeal of same.

6/14/88 Dictated letter to National Movement relative to postponement of Assembly permit.

6/20/88 Reviewed letter to me dated 6/16/88 from Howard Weatherspoon in reference to postponement of permit for Assembly.

6/21/88 Dictated memo to Beau Stubbs in reference to reply to National Movement relative to postponement of Assembly permit.

6/28/88 Dictated memo to Board of Commissioners in reference to denial of the application for Assembly (or postponement of application).

6/28/88 Reviewed letter from Beau Stubbs dated 6/27/88 to Howard Weatherspoon in reference to the language in our Ordinance relative to application being submitted no earlier than 60 days prior to the scheduled event.

11/15/88 Reviewed letter to me and Commissioners dated 11/11/88 from Scott Weaver in reference to review of application and change of time for Assembly.

11/18/88 Conference with Beau Stubbs in reference to proper procedures to follow relative to a request from Scott Weaver requesting changes in application as submitted.

11/23/88 Reviewed assembly application as submitted by Joe McNamee dated 4/4/88.

11/29/88 Dictated letter to Scott Weaver as a reply to his letter dated 11/11/88, in which I returned the application in order for him to make the changes as outlined in his letter. This letter was mailed certified mail to The National Movement, P. O. Box 1321, Cumming, Ga. 30130.

12/15/88 Telephone call from Richard Barrett in reference to him not receiving my response of 11/29/88 relative to the change in time which The National Movement requested. I directed Howard to go to the post office to inquire about the certified letter to The National Movement dated 11/29/88. The Post Office advised him that the letter had not been signed for and remained in P. O. Box 1321. Howard then retrieved the letter from the Post Office and we mailed same to P. O. Box 6700, Jackson, Mississippi (certified mail). The letter was signed for in Jackson, Mississippi on 12/19/88.

12/15/88 Reviewed letter from Scott Weaver dated 12/11/88 in reference to the above subject.

12/20/88 Reviewed letter from Richard Barrett Dated 12/17/88 in reference to our telephone conversation of 12/15/88 and outlining his desires to



reserve the courthouse grounds from 8:00 a.m. until 11:00 a.m. on 1/21/89.

12/22/88 Meeting with Gerald Blackburn in reference to the hours requested (8:00 a.m.-11:00 a.m.) in Barrett's letter dated 12/17/88 and discussing the time and permit as issued by the City of Cumming. (Ed Ledford present at meeting).

12/22/88 Received and reviewed permit application dated 12/19/88 together with letter from Richard Barrett dated same date. Reviewed Parade & Assembly Ordinance and Amendments.

12/22/88 Telephone Conference with Beau Stubbs in reference to the time change request and advising him of the conditions of the permit as issued by the City of Cumming.

12/28/88 Conference with Sheriff Walraven and conference with Gerald Blackburn in reference to coordination agreement of county permit.

12/29/88 Reviewed letter to Gerald Blackburn from Richard Barrett dated 12/26/88 relative to amendment of City permit to 9:00 a.m. rather than 1:00 p.m.

12/29/88 Meeting with Beau Stubbs in reference to issuance of permit to The Nationalist Movement for an assembly on 1/21/89.

12/30/88 Issued permit and dictated letter to Richard Barrett outlining the conditions contained in the permit and mailed same by certified mail.

12/30/88 Conference with Sheriff Wesley Walraven in reference to the permit as issued to the Nationalist Movement this date.

1/03/89 Reviewed letter to Gerald Blackburn dated 12/28/88 in reference to Appeal of the 1:00

p.m. in the City Permit (letter from Richard Barrett).

1/04/89 Reviewed letters from Richard Barrett dated 12/30/88 to me, Gerald Blackburn, and the Forsyth County Board of Education relative to Parade plans, amendments and alternative plans for holding the parade and rally on 1/21/89.

1/04/89 Telephone conference with Gerald Blackburn relative to Barrett's letter of 12/30/88.

1/04/89 Received call from Beau Stubbs advising me that he had received a call from Richard Barrett stating he was appealing my decision as to the $100.00 application fee. Beau advised me to place his appeal on the Board of Commissioners' Agenda for the meeting of 1/9/89. I placed same on Agenda for 1/9/89.

1/09/89 Appeal of Richard Barrett denied by Board of Commissioners.

1/11/89 Dictated letter to Richard Barrett advising him that his appeal was denied by the Board of Commissioners on 1/9/89, and that the $100.00 application fee stands.

---



## APPENDIX P

*A meeting of the Forsyth County Defense League was held on March 11, 1987, at the home of Junior and Martha Staton,* for the purpose of making the League official and for preparation of their first march and rally.

At 8:25 P.M., the meeting was called to order by Mr. Richard Barrett (the League's acting attorney) with invocation give by Rev. E. S. Hall, Mr. Barrett made introductions of the organizers of the League: Mr. Mark Watts, Mrs. Beverly Watts, and Mr. Frank Shirley.

There was discussion of the court meeting held in Gainesville, Ga., at 9:00 A.M., on March 11, 1987, requesting the request be granted and permit issued to the Forsyth County Defense League to allow a march and rally at the Forsyth County Courthouse. It was agreed that the League would make no compromise but insist on the use of the courthouse for the rally.

At 8:50 P.M., the Forsyth County Defense League was officially adopted as an organization and the first regular meeting was called to order with Rev. E. S. Hall presiding for election of temporary officers to serve until the organization is fully established to elect permanent officers by all members.

PRESIDENT – Mart Watts was nominated by Jerry Lord and seconded by Frank Shirley. There were no other nominations. Mark Watts was elected by unanimous vote.

VICE-PRESIDENT – Jerry Lord was nominated by Frank Shirley and seconded by Junior Staton. There were no other nominations. Jerry Lord was elected by unanimous vote.

TREASURER – Deborah Lord was nominated by Mark Watts. There were no other nominations. Deborah Lord was elected by unanimous vote.

SECRETARY – Betty Brock was nominated by Beverly Watts. There were no other nominations. Betty Brock was elected by unanimous vote.

SECURITY CHIEF – Edward Frix was nominated by Mark Watts. There were no other nominations. Edward Frix was elected by unanimous vote.

CHAPLAIN – Junior Staton was nominated by Richard Barrett. There were no other nominations. Junior Staton was elected by unanimous vote.

NATIONAL AND LEGAL SPOKESMAN – Richard Barrett was nominated by Mark Watts. There were no other nominations. Richard Barrett was elected by unanimous vote.

YOUTH COORDINATOR – Lee Bates was nominated by Richard Barrett. There were no other nominations. Lee Bates was elected by unanimous vote.

DIRECTOR OF INFORMATION – Frank Shirley was nominated by Mark Watts. There were no other nominations. Frank Shirley was elected by unanimous vote.

Each elected officer gave a statement to the organization.

Mark Watts suggested the organization elect Rev. E. S. Hall as an Honorary Chaplin, because he is well-familiarized with the Bible and has been working toward the same goals as the Forsyth County Defense League for



58 years. Rev. Hall was elected by unanimous vote. He made his statement to the group.

Richard Barrett presided over the remainder of the meeting. He suggested a set of by-laws be adopted by the League. He said he would make a draft of by-laws and have them ready for discussion, revision, and/or approval by the next regular meeting of the Forsyth County Defense League.

It was voted that the regular meetings of the Forsyth County Defense League be held on the first Tuesday of each month at 7:30 P.M. in the homes of volunteers until an official meeting place could be found. The next meeting will be April 7, 1987, at 7:30 P.M., at the home of Junior Staton. The May meeting place will be decided at the April meeting.

Richard Barrett presented the League with a copy of a petition to Governor Joe Frank Harris. The petition was accepted by unanimous vote as an official document of the Forsyth County Defense League.

Barrett made the following suggestions:

(1) The League march on March 14, 1987, if the Judge approves or wait if the Judge so declares. There was discussion by members and agreement with Barrett.

(2) The League insist that the Forsyth County Courthouse be made available to the Forsyth County Defense League instead of the City Hall. There was discussion then a unanimous vote in agreement with Barrett.

(3) The League advise Barrett of any inquiries into the Forsyth County Defense League, and he will send a computerized letter thanking them for their interest

and giving a brief summary of the Forsyth County Defense League.

(4) An emblem be adopted as a symbol of the Forsyth County Defense League. Barrett offered an emblem which was accepted by unanimous vote. It shows a red background with a combination of a cross and a star in white outlined in blue. The symbol stands for "Victory – North, South, East, West."

(5) A display be set up at the march to allow articles to be sold supporting the Forsyth County Defense League.

Walter Wade and Lee Bates have purchased poster board and letters and are making posters and signs for the march.

A mimeograph machine was made available by Gary Clifton.

Dave Holland has made his sound system available.

Donations will be collected at the march and other meetings. Jerry and Deborah Lord will be in charge of these collections assisted by Lee Bates and Walter Wade.

Martha Staton donated a table to be used at the march to display literature.

There was discussion about slogan's [sic] used by the Forsyth County Defense League. It was decided there would be no profanity, racism, or hatred depicted on signs or posters. The following suggestions were made:

Liberty, Majority, Victory
Down with Tyranny – Up With Liberty
Majority Not Minority Rule
Forsyth – Love It or Leave It



Justice for All – Favors for none
America for Americans
Constitution not Communism

We Are The People
U.S.A. Stays Free
We The People
The Future is Ours
This Land is Our Land
We Are Rising Again

It was voted that membership be open to all White, Christian people who will take the following oath:

"I swear or affirm my belief in freedom as the greatest endeavor, in America as the supreme nation, in Christianaty [sic] as the superlative religion, in social justice as the noblest pursuit, in the White race as the ultimate civilizer, in the English language as the premier voice, in the work ethic as the incomparable standard, in countrymen as the noblest fraternity, in nationalism as the unconquerable force, and in democracy as the best government."

All persons present at this first organized meeting of the Forsyth County Defense League took this oath. A list of the members present is as follows:

| | | |
|---|---|---|
| Richard Barrett | Rev. E. S. Hall | Frank Shirley |
| Lee Bates | John Lamb | Junior Staton |
| Betty Brock | Deborah Lord | Martha Staton |
| Dena Brock | Jerry Lord | Walter Wade |
| Lori Brock | Wendy Lord | Beverly Watts |
| Gary Clifton | Judy Scruggs | Mark Watts |
| Edward Frix | | |

The meeting was adjourned with prayer by Rev. Hill followed by pictures made of the new officers and all people present.

Betty Brock
Secretary
Forsyth County Defense League

---



## APPENDIX Q

*The April meeting of the Forsyth County Defense League was held on April 9, 1987, at the Forsyth County Courthouse.* At 7:15 P.M. the meeting was called to order by Frank Shirley with invocation given by Rev. Billy Smith.

Frank Shirley discussed allegations made in the suit filed against the FCDL by Morris Rees on behalf of Hosea Williams and the NAACP. He said the charges were invalid and that the FCDL intended to expose Morris Rees and file a counter suit for violation of the rights of the FCDL. Shirley also commented on the bi-racial committee's reference to investigating "hate groups" and gave support for the retention of our present State Flag.

Richard Barrett read a document comparing the demands of Hosea Williams with the objectives of the FCDL. This document was then voted as an official document of the FCDL.

Rev. Billy Smith read a "Statement of Christian Ministers in support of True Christian Love and Freedom in Forsyth County, Ga." This letter was adopted as an official document of the FCDL.

The floor was then opened to anyone wishing to speack, [sic] make comments, or ask questions. All elected officials present were recognized.

Richard Barrett submitted a resolution to the FCDL that "intimidation and oppression of the FCDL to freedom of assembly and their rights" be stopped and that the GBI be abolished. This resolution was accepted as a policy of the FCDL.

The business portion of the meeting was then conducted with Frank Shirley as moderator. The by-laws were passed around to be read by those present and then were accepted as the official by-laws of the FCDL.

Barrett gave the treasurer's report. Since Mark and Beverly Watts had resigned from the FCDL, they had submitted a report to Barrett of money they had received and disbursed. Part of the treasurer's report was outstanding since Deborah Lord was not present to give her report.

After a brief interruption and discussion, it was agreed by all present that the FCDL was not a part of the KKK.

New officers were elected at this time as follows:

Chairman elect – Richard Barrett (until his services in the case with Morris Rees is setteled. [sic])

1st Vice-Chairman and Acting Chairman – Junior Staton
2nd Vice-Chairman – Garry Clifton
Secretary – Betty Brock
Treasurer – Judy Scruggs
Chaplain – Billy Smith
Youth Coordinator – Lee Bates
Director of Information – Frank Shirley

It was voted that no drinking would be allowed at any meetings of the FCDL.

Jerry Lord and Edward Frix resigned as members of the FCDL.



The regular business meetings of the FCDL will be held at the Forsyth County Courthouse in the Community Room on the 2nd Thursday of each month at 7:30 P.M. with the next meeting being May 14, 1987.

The meeting was then adjourned with prayer by Rev. Billy Smith.

/s/ Betty Brock
Betty Brock
Secretary
Forsyth County Defense
League

---

## APPENDIX R

*The May meeting of the Forsyth County Defense League was held on May 14, 1987, in the Community Room of the Forsyth County Courthouse.* At 7:20 P.M., the meeting was called to order by Junior Staton with invocation given by Pastor Gene Hall, followed by the pledge to the flag of the U.S.A.

The minutes of the April meeting were read. Corrections were made and the minutes were approved.

The Treasurer's report was read and approved. Deborah Lord has not contacted anyone to turn over her part of the treasurer's report. Attempts to contact her will be made by the next regular meeting.

There were no reports from any committees.

OLD BUSINESS:

Richard Barrett presented Jackie Little with a U.S.A. Flag as an award for her arrest at the January 24, 1987, march and subsequent court acquittal. Barrett is to get certificates to be presented to all those arrested at the marches to show moral support from the FCDL for their standing up for their rights.

NEW BUSINESS:

Due to some mixup of the meeting time, it was voted that regular meetings of the FCDL would begin at 7:30 P.M.

Richard Barrett presented the following items:

1. There was discussion of cases still pending on those arrested at the marches. Barrett has sent out a letter to persons who have inquired about the FCDL.



2. There will be a Washington News Conference on the east front center steps of the capitol in Washington, D.C., on Tuesday, May 19, 1987. Barrett encouraged all those who could to [sic] go with him.

3. Presented the FCDL with a charter which would make the League a non-profit, tax-exempt, charitable organization. Barrett briefly read the main points of the charter. He suggested the charter be shown as the "Nationalist Movement" as an umbrella for any and all organizations such as the FCDL. He suggested that the organization be chartered in Mississippi since the fee for such would only be $25 compared the [sic] $75 in Georgia. A motion was made and voted to accept Barrett's suggestions.

4. A special program of interest to the FCDL would be aired on TV on Channel 36 in the near future.

5. Barrett told about his interview on WEST. Pastor Hall told of a radio talk show which aires beginning at 7:00 - 9:00 P.M. (depending on the previous broadcast) to which anyone could call in and express their opinions on any subject (1-800-WSB-TALK).

6. A letter has been sent to Gary Armes, pastor of the 1st Christian Church in Cumming, and Roger Crowe challenging them to a debate with the FCDL on spiritual aspects of it's [sic] cause. There has been no response.

7. Encouraged members to write "letters-to-the editors" of the local newspapers.

8. Plans are being formed for an outdoor rally to promote more members and interest in the League. Anyone who knows of any property to hold the rally on should contact Barrett.

9. The FCDL has a new Post Office Box (#1321). All literature will be changed to accomodate [sic] this

address. Any mail addressed to P. O. Box 684 will continue to go to Barrett in Mississippi.

10. Encouraged those present to take some literature he had brought and pass it out or leave in certain areas in town.

11. The FCDL has a valid lawsuit against Forsyth County because it was denied a march and rally and use of the courthouse. Barrett said he opted to drop any charges and not prosecute in lieu of attorney's fees. He said this would show good faith on the part of the FCDL and perhaps save the County a lot of money. Also, in the Morris Dees case, Barrett has offered not to file a countersuit if Dees will dismiss all charges against the FCDL.

12. Said that one head of the "3-headed dragon" had been cut off with Gary Hart's dropping out of the Presidential Candidacy. Pastor Hall suggested we remember Acts 13:1.

13. A small victory has been won with the acquittal of two people who were arrested at the march on January 24th. There was an applaud for these two people and the jury that acquitted them.

14. There are radio stations all over the U.S.A. that will make interviews over the phone. Barrett suggested the League consider making use of this means of publicity.

15. More pamphlets and literature needs to be printed and made available to the public.

16. A letter has been sent to David Duke requesting the names of those who contacted him as a result of his letter under the name of the "Forsyth County Defense Fund". Much confusion was caused by his letter which resulted in monies being sent to him.



He has also been requested to advise the FCDL of the disbursal of funds he received.

17. A T-shirt fund has been established as a fund raiser for the FCDL. Donations to the fund were taken with Barrett encouraging each one to give $20.

18. "Talent Search" forms were passed out. These forms list various areas in which help is needed in the FCDL. These forms are to be returned showing what areas individuals can and will participate.

19. Barrett is in the process of printing membership cards to be given to each member of the FCDL.

20. Barrett has been answering out of state inquiries about the FCDL.

21. Barrett has written and made copies of a "Preacher's Statement in Support of the FCDL." He asked anyone who knew a preacher(s) who would sign it to take a copy and pass it around. Bill Bohannan took a letter and said he knew a preacher who would sign it.

22. Membership applications were passed out to non-members present. Everyone who signed up at that time was presented a flag.

23. Barrett suggested the FCDL challenge Hosea Williams to a debate on neutral grounds. The pros and cons were discussed. There was concern that Williams would only benefit from this be [sic] receiving more publicity. However, Barrett said the League would also receive publicity. This was tabled until the next meeting.

Dennis Brock asked to be recognized at the end of the meeting after the press was excused. He made several attempts to let the press leave. However, Barrett insisted the League was formed to be open to the public and not

behind closed doors. Barrett tried to get Brock to wait and arrage [sic] a special meeting with the officers, but Brock insisted that all members present should be aware of what he had to say. Brock then accused Mark Watts of improper record keeping and mis-handling of funds and giving an invalid treasurer's report to the FCDL. He accused Barrett of covering up for the Watts' by not telling the truth to the FCDL or the press.

Barrett attempted to explain errors on the April treasurer's report stating that the FCDL could not go back and correct any mistakes that had been made. Brock told Barrett he was lying and still covering up and only wanted to run all the business of the FCDL for his benefit. He said Barrett only wanted publicity and money for himself.

There was much concern that the public had not been given the right impression of the FCDL and the new officers and all members present wanted to make sure the public knew the FCDL was making every endeavor to be as open and honest as possible. Barrett made the following statement on behalf of the FCDL to attempt to clear up any past misunderstandings and/or discrepancies:

"We regret the record keeping prior to the official organization of the FCDL was not kept in a satisfactory state of affairs. Beginning with the new board, we have kept, and will keep, full records open, honest, and acceptable; and we pledge the utmost integrity and dedication of each members of this board toward our goal of democracy, Americanism, and freedom. We urge the help of



every member of the FCDL and every good citizen to help us achieve this endeavor."

Judy Scruggs questioned opening a bank account and collecting mail. Barrett wanted to open a bank account in Mississippi because, he stated, the service charges would be cheaper. He also wanted all mail forwarded to him. Other members insisted that all correspondence and money should remain with the League and in Forsyth County and not in Mississippi. After much discussion, it was agreed by members present that the FCDL would use P. O. Box 1321 as the new mailing address and Judy Scruggs and Betty Brock would each be given a key and would make arrangements to meet and open the box at the same time. It was further agreed that Scruggs would open an account at a bank which would require two signatures to write and cash checks. Barrett suggested Junior Staton and Judy Scruggs sign the checks. However, Scruggs argued that it would not be best since she and Junior Staton were in the same family and would rather Betty Brock Sign with her since they were not related and were Treasurer and Secretary. Barrett said this was not the usual way checks were signed; however, the members decided it was the best way.

The new officers agreed they wanted to be as honest and open as possible to the people whom they represent and regretted any errors or discrepancies incurred prior to their election.

The meeting was adjourned with prayer by Pastor Hall.

/s/ Betty Brock
Betty Brock
Secretary
Forsyth County Defense League

---



## APPENDIX S

*A special meeting of the FCDL was called on May 17, 1987, at the home of Junior Staton.* The meeting was called to order at 2:40 P.M. with Staton presiding as Chairman.

This meeting was for the purpose of clearing up arguments, disagreements, and discrepancies discussed at the May 14, 1987, meeting.

The following items were discussed:

1. Pastor Hall submitted a newsletter he had received showing two items of interest to the FCDL:

National Movement
Richard Barrett
P. O. Box 1182
Houston, Texas
77251 USA

Spirit of America Day
Box 3333
Jackson, Miss. 39207 USA

There was concern with the National Movement and the proposed charter made under the name "Nationalist Movement." It was decided by unanimous vote that Betty Brock would write the Secretary of State of Texas and Mississippi to obtain further information on each of these organizations.

2. It was agreed by unanimous vote for Betty Brock and Judy Scruggs to go to the post office as follows:

   1) determine how the Box 684 was originally issued

   2) if to the FCDL, could it be turned over to the FCDL

   3) if not, how to get all FCDL mail going to Box 1321

   4) find out how many keys were issued to the box the FCDL would be using and perhaps changing the lock on the box.

Junior Staton had one key to Box 1321 which he had received from Barrett. He turned it over to Betty Brock.

3. It was decided by unanimous vote that the FCDL should be chartered in Georgia. A suggestion was made that the charter by "Defense Leagues of America" based in Cumming, Forsyth County, Georgia. This organization would remain FCDL as the home office.

4. Junior Staton was elected by unanimous vote to talk with attorney Jane Kent Plaginos regarding the FCDL being chartered and becoming a corporation and if she would be the Leagues' legal attorney.

5. There was concern over the fact that Barrett was printing material and sending out correspondence without prior approval from anyone in the FCDL. It was agreed by unanimous vote that Barrett be advised to stop any communications in reference to the FCDL without prior approval of the League. Also, any fees to him should be discussed with the League since he had self-appointed himself and volunteered his services as a legal spokesman and was not the League's attorney. He should not make any further printing, purchases, or other expenditures without approval by the League. Staton agreed to compose a letter to him.

6. All present agreed and unanimously voted that it would be in the best interest of the FCDL for Judy Scruggs to open an account with the Forsyth County Bank requiring her's and Betty Brock's signatures on the checks. Also, to give the Bank permission to release information to anyone requesting information about the account if they have an account number from the FCDL. The League felt that any money in the account belonged to the citizens of Forsyth County and the amount in the account should be no secret.



7. It was felt that an apology to the citizens of Forsyth County and other supporters of the FCDL should be made and put in the local newspapers. This apology would be for anything out of the control of the new officers and members which has caused any misunderstanding or discrepancy. This item was tabled until the next meeting to allow time for current discrepancies to be resolved.

8. The membership application is not satisfactory to the FCDL as worded. Discussion for the correct wording was made. Garry Clifton is to work on a new membership application to present at the next meeting.

9. The new officers and members of the FCDL felt that the main problem with the League now was unresolved involving correspondence and money from Mark Watts and the cover-up by Barrett. It was voted by unanimous vote that Garry Clifton, as a representative of the FCDL, and Dennis Brock, as a witness to what he knew was fact, go to Rafe Banks and discuss how the FCDL could clear up an questions including:

1) discrepancies on Watts' treasurer's report
   a) phone bills
   b) invalid receipts
   c) money received
   d) donations
   e) mail he received
   f) P. O. Box 684
2) Frank Shirley's involvement with the FCDL
3) Connections to David Duke
   a) a letter sent out with Watts' signature for Forsyth County Defense Fund
   b) money he has subsequently received

4) Barrett's cover-up and protection of Watts, Shirley, and Duke

5) correspondence forwarded to Barrett by the post office

   a) money received and spent

   b) letters and literature mailed out

6) Attorney fees requested by Barrett

7) Threats made by Watts

   a) to the newspaper

   b) to Dennis Brock

8) Lies that have been told and truths not told by Watts and Barrett.

The meeting was adjourned at 4:40 P.M.

/s/ Betty Brock
Betty Brock
Secretary
Forsyth County Defense League

---



## APPENDIX T

RICHARD BARRETT

LAWYER

LEARNED, MISSISSIPPI 39093

MAILING ADDRESS:
POST OFFICE BOX 6700
JACKSON, MISSISSIPPI 39212

AREA CODE 601:
373-4400
885-2288

July 17, 1987

Robert Stubbs III, Esq.
PO Box 1589
Canton GA 30114

Re: File #64-L FCDL

Dear Mr. Stubbs:

Administrator Roberts requested the names of the current representatives of the Forsyth County Defense League which he may have occasion to deal with. They are: Jim Harding, chairman; Joe McNamee, secretary; Richard Barrett, attorney (in the federal lawsuit); H. G. McBrayer, Georgia counsel.

*The League meets at the Courthouse each second Thursday at 7:30 PM;* since use of the building is connected with the pending litigation, Mr. Roberts may deal with me or Mr. Harding about administration of the room, premises, etc., or as you may propose. The organization would like to reserve the downstairs Community Room through December at this time.

As you know, the so-called Bi-Racial Committee meets in the Courthouse and excludes the public and press. The League favors the opposite kind of forum: one which is more open and representative of the views of the

citizens. However, the League is also entitled to security commensurate with the Committee or anyone else, as well as to an even-handed treatment in use of the Courthouse facilities.

Lately, some individuals have attempted to disrupt the League's meetings or to video tape without the organization's consent. This has hampered the orderly conduct of League affairs.

Since it is illegal to disrupt a lawful meeting, I would appreciate the Sheriff being advised that the League desires to enforce its rights to conduct a lawful meeting without interference. To that end, it will exclude anyone who has been or is likely to be disruptive. Anyone who actually is disruptive will be removed and appropriate charges filed.

Naturally, it is the League's intent to avoid any possible confrontations or breaches of the peace; this letter is to secure appropriate cooperation and coordination toward such end by all concerned. And to do so without delay in time for the August 13th meeting.

The interim accounting you requested is enclosed.

Perhaps you will advise me of the outline I previously submitted to you for a constitutional and satisfactory parade ordinance, so we may close this file and spare additional expenses to the taxpayers. We had offered to conclude the litigation, but have had no reply from you. Obviously, having won the right to exercise their constitutional rights to freedom of speech, the citizens of Forsyth County cannot now abandon these important freedoms.



As I advised you before, the League desires a lawful parade ordinance; the current one abridges too many of the First Amendment rights of citizens to speak and assemble, but a suitable ordinance (as I submitted to you) is simple, proper and should be enacted without further delay.

Sincerely,

/s/ Richard Barrett

rb:hs
Encls.

---

## APPENDIX U

BULLETIN OF
Forsyth County Defense League
"All The Way"

VOL. 1 #2 – AUGUST, 1987

### BANQUET SEPT. 4TH

The long-awaited "Sons of Liberty" Banquet honoring the 1987 patriots who opposed the Black Power Invasion of Forsyth County will be held September 4th. *The gala even will be at 5:00 PM at the Dinner Deck Restaurant at Cumming, Georgia.* Those arrested, harassed and beat up will receive the honors of a grateful community and nation. General public and all Nationalists welcome! Tickets $15.00 each in advance.

### PARADE POSTPONED

The Sept. 5th "Constitution Revival" Parade in Cumming has been postponed. Forsyth County and the City of Cumming did not meet the August 13th deadline to notify us of the parade permit application approval. But negotiations continue and you shall rise again – at a later date to be announced.

### ARRESTEES INVITED

Those arrested for opposing Hosea Williams and his gang will receive a free ticket for themselves for the Sons of Liberty Banquet, Friday, Sept. 4th. But, you must make



your reservations in advance (return form on the reverse).

### SPECIAL SPEAKERS

"Sons of Liberty" Banquet speakers will include Richard Barrett of Mississippi, a key organizer of our January 24th counter-protest, and Rev. Jimmy Wynn of Lawrenceville, a leading speaker at our Majority Rights' Freedom Rally in March. The theme: "Heroes Today: Patriots Forever." The bi-centennial of the Constitution will also be celebrated. Barrett will also speak at evening observances at Stone Mountain, Georgia, September 5th.

### T-SHIRTS

"White Forsyth: Free USA" T-shirts are now available. (Six colors, super sharp). Order yours. Also "No Black Power" buttons are hot off the press. Wear yours as a proud, free American.

### MULATTO COMMITTEE QUITS

The Mulatto (Bi-Racial) Committee has quit using the Forsyth County Courthouse and has gone out of business, thanks to FCDL opposition. It was organized with great fanfare to integrate the County. Not a single one of its many demands has been met.

### DEES DEFEATED IN BIG LEGAL VICTORY

The FCDL has compelled left-wing lawyer Morris Dees to dismiss it from the lawsuit Hosea Williams filed

against anti-black power patriots. The ultimatum to Dees was to be slapped for attorney fees, costs and damages. This is the first major defeat for Dees, who had vowed to bust your League at all costs. Dees also tried to get the League's records but failed. Said league attorney Richard Barrett in a news conference at the Alabama Capitol: "I've come to Alabama with Morris Dees over my knee."

Now, citizens can join in patriotic activity without fear of harassment. The suit charged that the FCDL "discriminated" against non-whites with violence and harassment. By dismissal "with prejudice," all the charges are deemed in law to be false and can never be raised again.

## NO MEMBERS' NAMES TO SHERIFF

Forsyth County Sheriff Wesley Walraven has asked that your League deliver a list of its members to him as a condition for using the Courthouse for regular monthly meetings. This demand has been refused. Your freedom of association, assembly and speech will not be compromised in any way.

## SUPPORT BORK

The FCDL has approved a resolution supporting the confirmation of Robert Bork as Supreme Court Justice. Bork, a conservative, has taken stands upholding the Constitution and reversing the so-called civil rights' edicts of the past few years. Resolutions also supported Ollie North and the Contras, condemned Gov. Joe Frank Harris' newly appointed Human Relations Council as a "sneak attack against majority working people" and



launched a membership recruiting drive in North and South Georgia.

## ADL ATTACKS

The Jewish Anti-Defamation League (ADL) has attacked the League calling it a "white supremacist" organization. It credits you as being the chief opposition to black power. Numerous other editorials and papers have commented on the impact of the League on the whole nation and the effectiveness of your organization.

## Y'ALL COME

*All patriots and Nationalists are urged to attend your League meetings each Thursday at 7:30 PM at the Forsyth County Courthouse in Cumming. Next is September 10th.* Let us know if you can attend and help organize weekend rallies around Georgia.

## POSTERS

New Posters will cost over $1,200.00.

If you would contribute to this project, we will assure that teenagers will be supplied the posters they have requested – and the inspiration they need.

White
Forsyth
Free USA

## TIFTON DRUGGIST BACKED

A letter of support has been sent to the Ewing-Cox Northside Pharmacy in Tifton, Georgia, where the druggist recently exercised his freedom of choice to hire (or

fire) whom he pleased. The FCDL said: "What separates the USA from Russia is that we believe in private property and individual rights: the right to have a business, to own land and to hold in your hands the fruits of your own labor. Because communism is on the march, you will be maligned and attacked. But stand your ground, so America will be free." The druggist rightly felt that he (and his customers), not the NAACP, should decide who he employs.

## CAPTIVE NATIONS' ALLIANCE

League officials met in Washington with leaders of Eastern Europe Freedom Fighters recently headed by Rumanian [sic] Nationalist Dr. Serban Andronescu. An an anti-communist alliance was formed, including a picketing of communist embassies.

## LETTERS

I saw your Majority Rights' Freedom March on TV. You all look great! –J. P., Mass.

I share "All The Way" with friends. It makes me proud. –J. K., Ill.

You are catching on here in a big way. People are ready. – J. W., Calif.



---

**ORDER FORM**

NAME _____ ADDRESS _____

CITY ____ STATE ____ ZIP ____ DONATION $ ____

Annual Member:
[ ] regular $20.00 [ ] Youth $12.00
[ ] Newsletter $12.00 a year
[ ] T-Shirt size _____ $10.00
[ ] _____ Banquet Reservation(s),
Sept. 4th, $15.00 each

---

Forsyth County Defense League
PO Box 1321 / Cumming, Georgia 30130

---

*An Independent Affiliate of The Nationalist Movement*

---

**APPENDIX V**

---

Forsyth County Defense League

LOGO

(601) 373-4400

---

PO Box 1321
Cumming GA
30130

---

An Independent Affiliate Of The Nationalist Movement

COMMISSIONERS COPIED

August 18, 1987

Mr. Ralph Roberts
Forsyth County
PO Box 128
Cumming GA 30130

Dear Mr. Roberts:

*Thank you for your letter of August 13th just received regarding our meetings at the Courthouse. Kindly note that we wish to continue to meet the second Thursday (you letter said Tuesday), 7:30 PM, in the Community Room.*

We take exception to treatment which differs from that accorded to the Bi-Racial Committee (it met behind closed doors and excluded the press and the public). Notwithstanding, we are pleased to cooperate with you, Mr. Roberts, and we do appreciate your accommodating us.





As to your recommendations:

1. Access to all orderly persons.

Agreed.

2. No locking of doors.

Agreed.

3. Access to press.

Agreed as to all authorized press of recognized media with proper identification only.

4. Conduct to avoid deputy from having to respond.

We agree to do our part; that is, we all continue to conduct our business, present speeches and take positions on issues of public importance in an orderly manner. However, some outsiders have attempted to disrupt our meetings. Consequently, we respectfully wish to protect the rights of those attending and, to such end, seek assistance from law enforcement to exclude or prosecute anyone engaging in disorderly, disruptive or illegal conduct.

5. Furnish list of members.

Not agreed. This would violate (or tend to chill) the Constitutional rights of members (and the public attending) to freedom of assembly, association, speech and the right to petition.

However, an alternative is suggested. You may certainly have the name of our principal officials, who are: Jim Harding, Chairman; Joe McNamee, Secretary; and Richard Barrett, Attorney.

In addition, *enclosed are facsimiles of our membership cards* which members will be asked to bring. We do not envision opening up wholesale card checking or interfering with those genuinely interested in attending meetings, of course.

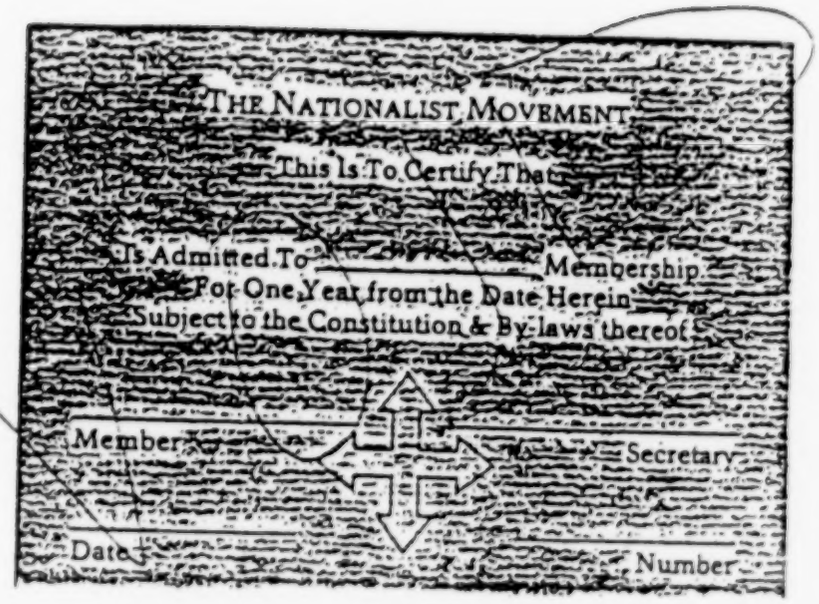
I hope this adequately responds to your concerns and that you can grant our request for the reservations. With regards, I am

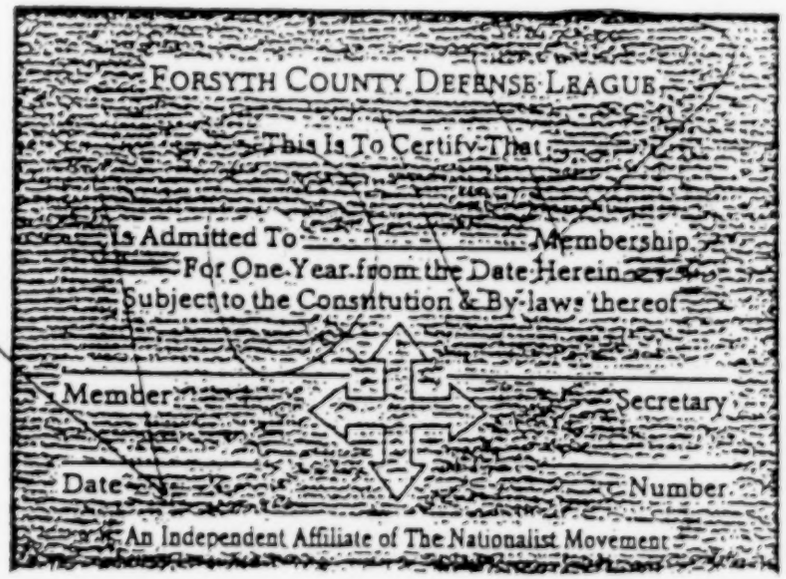
Yours Sincerely,

/s/ Joe Mc Namee
JOE MC NAMEE
Secretary

jm:hs
Encls.





**APPENDIX W**

BULLETIN OF THE
FORSYTH COUNTY DEFENSE LEAGUE
"ALL THE WAY"

VOL. 1 #4 – OCTOBER, 1987 LOGO

## TAR HEEL NATIONALISTS MARCH ON

A determined "no retreat" policy combined with an outpouring of blue-collar support has defeated an attempt by North Carolina officials to prevent Nationalists from organizing in the Tar Heel State. Our first "beach head" was established in Spindale, but the two tried to stop meetings in the city auditorium, only to back down when a lawsuit, similar to the one we won for free speech in Forsyth County, was promised. Freedom is not free! A price must continually be paid by the downtrodden.

## NORTH CAROLINA MARCHES PLANNED

"Majority Rights" freedom parades and rallies are on the drawing boards for Greensboro, December 20th, and Raleigh, January 16th. The events will focus on Constitutional Revival, Workers' Rights and abolition of the King Holiday. Youth and working people (especially hard-pressed cotton mill workers) are invited to take part. Lift the yoke of your oppression by job quotas, affirmative action and anti-majority tyranny. This land is your land. Take every inch of your turf-back!



## FORSYTH RALLY VICTORY COMPLETE

The FCDL has won an unqualified victory over Georgia Governor Joe Frank Harris and state officials who tried to bar citizen participation in its outdoor public activities. The City of Cumming, after a 10-month federal court battle, relinquished its opposition to the January 23rd Anti-Kind, Pro-Work Parade and agreed that no fees would be charged. Forsyth County attempted to levy a $100.00 rally fee in a new ordinance, but the federal court refused to validate the measure, despite the County and the ACLU teaming up to force the unconstitutional law upon the people. The County was also ordered to pay the FCDL's attorney fees for depriving Forsyth County citizens of their freedom of speech.

## BIG PRO-WORK, ANTI-KING PARADE JAN. 23

The hard-fought-for Constitution Revival "Let the People Rule" Parade is scheduled to assemble Saturday, January 23rd, 1988, at the Forsyth County High School in Cumming, Georgia, at 11:00. The March begins at Noon, down Tribble Gap Road, to the Courthouse for rally and speeches until 2:00 PM. All patriotic youth and working people are invited to march. On the anniversary of the January Invasion, the event should be the most significant anti-Martin Luther King happening in the country. This year's theme: Those who work shall not support those who loaf.

## FLORIDA ORGANIZATION SPEEDS UP

Following our two-hour broadcast on Tampa's WFLA, a deluge of request for membership and literature has poured in. To keep pace, Nationalist organizers will visit South Florida shortly speaking and holding news conferences. Contact headquarters if you can assist or wish to attend.

## SNAPPY PAMPHLETS SPREAD THE WORD

By popular request, two eye-catching recruiting pamphlets are not available. #10 – "The Forsyth County Covenant details the platform for national revival. #12 – "Why Join The Nationalist Movement" inspires youth to sign up now. Order yours for 1-on-1 organizing. And enlist your friends.

## TO MEET OR NOT TO MEET

Nationalists are urged to form local units. Organization manuals are now being made up. Or, you may be a member or contributor to headquarters. *Regular meetings are at the Forsyth County Courthouse (basement), each 2d Thursday, at 7:30 P.M.* Your national committee will be named shortly. Be a regular donor to assure social justice, real Americanism and majority rule.

## INPUT AND OUTPUT

Coordinator Scott Weaver announces that a complete list of literature, books, audio tapes and videos will be ready shortly. But member input is just as vital as our output. Through questionnaires and surveys, let us know



of your talents and plans for The Movement. We are mobilized for action. Needed are headquarters staff, writers, organizers and workers.

## BORK OR BUST

Nationalist resolutions supporting confirmation of Robert Bork to the Supreme Court have been delivered to key legislators. Apparent that existing "rightist" efforts are inadequate to advance the American Way of Life, The Movement's activities in the future should prove all the more decisive. If Bork bombs, unlatch the Hatch: Orrin Hatch, that is.

## DEES BACKS OFF LEAGUE

Left-wing lawyer and Gary Hart fund-raiser Morris Dees had been attacking the FCDL on national television before July 17th. On that day, all charges he had brought against the FCDL in behalf of his client, black-power activist Hosea Williams, were thrown out of court. Since then, Dees has not commented publicly about The League he once vowed to destroy. He also has dropped his threat to secure a court order against the League for taking pictures of him or his clients. The FCDL has charged that Dees is trying to install a Sandanista-style government in America – with special favors for the few and injustice for all.

## CARAVAN TO AROUSE NORTH GEORGIA COUNTIES

Eight North Georgia Counties will be caravanned with speeches and literature beginning on weekends next

month. They include: Dawson, Union, Fannin, Murray, Catoosa, Rabun, Towns and Gilmer, which are over 99% white. Volunteer. Take part.

## LETTERS

In Poland, outlawed groups throw leaflets all over the streets at night for the curious to pick up and read the next day. Because the left has become institutionalized (Negro College Fund, Urban League, "Open Housing," etc.) we must use unorthodox ways to sound the trumpet of freedom. Let's wake up the sleeping masses here in time to end the nightmare of red-power and black-power.

– T. M., Pinellas Park, FL

I admire your courage. It is not too late to turn this country around. "Free" to minorities means taking any darned thing we've got . . . our homes, our daughters, our paychecks, our rights. To be truly free, Americans must be free of the demands of the minorities, misfits and their ilk.

– R. M., San Francisco, CA

The stock market crashes again. About time. All that unearned wealth pilfered from hapless farmers, truck drivers and carpenters by pencil pushers on Wall Street. When bankers have their britches paddled by the very working people they've gouged with extortionate interest rates so long, there'll be prosperity for those who earn their bread by the sweat of their brow.

– S. J., Anderson, SC



---

**ORDER FORM**

NAME _____ ADDRESS _____
CITY _____ STATE ___ ZIP ___ DONATION $___

Annual Member: [ ] Regular $20 [ ] Youth $10
[ ] Newsletter $12 a year [ ] T-Shirt size ___ $10 gift
[ ] Buttons 2 for $1 gift [ ] Literature packet: free

---

Forsyth County Defense League
PO Box 1321 / Cumming, Georgia 30130

---

An Independent Affiliate of The Nationalist Movement

[Envelope]

PO Box 1321
Cumming GA 30130

[Stamp]

Ralph Roberts
Forsyth County
Forsyth County Courthouse
Cumming GA 30130

Address Correction Requested

---

(2)

No. 91-538

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FORSYTH COUNTY, GEORGIA
Petitioner

v.

THE NATIONALIST MOVEMENT
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION

RICHARD BARRETT
P.O. Box 2050
Learned, Mississippi 39154
(601) 885-2288
Attorney for Petitioner

## QUESTION PRESENTED FOR REVIEW

Should the ruling of the Eleventh Circuit Court of Appeals that a parade license fee of up to $1,000.00 per day violates the First Amendment -- on the grounds that such a charge exceeds a nominal sum -- be reviewed by the Supreme Court?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Appellants, Forsyth County, Georgia (Petitioner herein); City of Cumming, Georgia; Forsyth County Board of Education; and, the Appellee (Respondent herein), The Nationalist Movement.



## TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION



STATUTES



RULES

## OPINIONS BELOW

Nationalist Movement v. City of Cumming, Forsyth County, Georgia and Forsyth County Board of Education, 913 F.2d 885, vacated 921 F.2d 1125 (1990), cert. den. ____ U.S. ____, reinstated 934 F.2d 1485 (11th Cir.1991) (en banc); Nationalist Movement v. City of Cumming, Forsyth County, Georgia, and Forsyth County Board of Education, No. 2:89-CV-06-WCO (D.C.N.D.Ga., January 23, 1989).

---

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

---



## RELEVANT STATUTORY PROVISIONS

1. United States Constitution, Amendment I (text set out in Petition for Writ of Certiorari);

2. §3(6), Forsyth County Ordinance No. 34 (text set out in Petition for Writ of Certiorari).

---

## STATEMENT OF THE CASE

Respondent, The Nationalist Movement, a non-profit, pro-majority organization, held a rally and parade in Cumming, Forsyth County, Georgia, in January, 1988, about the courthouse square, to call for pro-majority reforms and to express opposition to the Martin Luther King Holiday. It applied to Petitioner, Forsyth County, Georgia, and others to hold a similar

parade and rally on January 21, 1989. Its affiliate previously held a rally at the Forsyth County Courthouse, in March, 1987, without paying any fees, under order of the United States District Court for the Northern District of Georgia. Petitioner interposed its parade ordinance -- originally adopted in January, 1987, and subsequently amended on June 8, 1987 -- for the January, 1989 parade, requiring up to a $1,000.00 per day fee, to which Respondent objected.

On January 19, 1989, Respondent sought declaratory and injunctive relief against Petitioner, charging that Petitioner's parade ordinance, which allowed the license fee of up to $1,000.00 per day, was facially unconstitutional, in violation of the First Amendment.

The District Court held that the ordinance was not unconstitutional; consequently, the rally and parade were not



held. The ruling was appealed and, on October 2, 1990, reversed by the Eleventh Circuit Court of Appeals on the grounds that an "ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment." Nationalist Movement v. City of Cumming, et al, 913 F.2d 885, 891 (11th Cir.1990), cert. den. ___ U.S. ___, Appendix B at 31. On rehearing en banc, the ruling in favor of Respondent was upheld, Nationalist Movement v. City of Cumming, et al, 934 F.2d 1482 (11th Cir.1991), Appendix D, pp. 47-48.

---

ARGUMENT

REASONS FOR DENYING THE WRIT

PROPOSITION I

1. THIS CASE APPLIES SETTLED LAW.

The Court of Appeals stated that it

was "aided substantially" by Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943), Appendix p. 30, note 6, which held that government "may not impose a charge for the enjoyment of a right granted by the Federal Constitution," 319 U.S. at 113, 63 S.Ct. at 875. After stating that it had reviewed the more recent Supreme Court cases involving traditional public forums, particularly Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir.1985), cert. den. 475 U.S. 1120, 106 S.Ct. 1637 (1986), the court found "no basis on which to reevaluate" long-standing precedent dating back some fifty years, see Appendix p. 30, note 6.

A doctrine of "long lasting acceptance" is given great weight in the Supreme Court, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917 (1975), and, as such, would weigh heavily against the granting of the Writ. Stare



decisis should also be a factor, see e.g. United States v. Rands, 389 U.S. 121, 88 S.Ct. 265 (1967) (as to the latter decision controlling the former), insofar as Murdock, relied upon by Respondent and the Court of Appeals, comes after and interprets Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1941), heavily relied upon by Petitioner.

The Court of Appeals applied constitutional law in terms of "modern free speech cases" and "modern constitutional doctrine," see Central Florida, 774 F.2d at 1522.

Respondent notes that such cases necessarily include Jones v. Opelika, 319 U.S. 103, 63 S.Ct. 890 (1943) (prohibiting license or tax to distribute literature); Follett v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717 (1944) (striking down a $1.00 per day fee on free speech); and, United States v. Texas, 252 F.Supp. 234

(W.D.Tex.), aff'd 384 U.S. 155, 86 S.Ct. 1383 (1966) (disallowing poll taxes).[1]

Petitioner's emphasis that "the cost of ... protection" motivates its fees,

---

[1] Although the Court of Appeals found that a "nominal" fee might pass constitutional scrutiny, Respondent averred below, and repeats here, that any fee is an unconstitutional restraint upon speech, cf. Kunz v. New York, 340 U.S. 290, 293, 271 S.Ct. 312, 314 (1951), or upon constitutionally protected rights; cf. Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079 (1966), Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1937), Martin v. Struthers, 319 U.S. 141, 36 S.Ct. 862 (1943); Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946); Flower v. United States, 407 U.S. 197, 92 S.Ct. 1980 (1972); Papish v. University of Missouri, 410 U.S. 667, 93 S.Ct. 1197 (1973); and, United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702 (1983).

Since the ruling below found the ordinance facially unconstitutional, the court did "not need to inquire whether the particular imposition of a fee ... is unconstitutional," Appendix p. 31, note 10. Therefore, whether a mere nominal fee may be charged is arguably not before the Court. If, however, the Writ is granted, Respondent would argue, alternatively, to uphold the Court below, or, to invalidate any free speech license fee, of any amount, as unconstitutional.



Petition, p. 4, seems but another thinly disguised ruse to abridge First Amendment rights based upon fear of violence. Such issue has, again, long been settled. See, e.g. Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103 (1972); Brandenberg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969); Terminello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949); and, Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

Petitioner's attempt to extrapolate Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746 (1989) to a granting of the Writ for the purpose of imposing fees upon free speech is misplaced. Ward does not impose fees on free speech; it allows the volume of music at a public forum to be modulated. Respondent does not dispute such a holding. In fact, in the case of Forsyth County Defense League v. Forsyth County, Georgia, No. C-87-31-G (D.C.N.D.-

Ga.1987), Appendix I, p. 128, the League secured injunctive relief against the County (being the same entity as Petitioner, here) in order to hold a rally; the order of the District Court, with which the League (a later-subsidiary of Respondent) fully complied, provided that the "injunction does not include the right to amplify speeches ... as to disturb the residents and visitors of the convalescent home across the street from the courthouse...."[2]

---

[2] It should be noted at this juncture that Petitioner has added materials which were not part of the record, below: Appendices E-G (newspaper clippings), J (purported printed bulletin), K (order from separate court case), L-M (newspaper clippings), P-S (purported minutes of meetings) and U, W (purported printed bulletins), and which should not be considered here. See Corporation Com. v. Cary, 296 U.S. 452, 56 S.Ct. 300 (1935), Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 61 S.Ct. 666 (1941), reh. den. 312 U.S. 715, 61 S.Ct.666 (1941) (record cannot be added to). However, if the Court makes an exception in this instance, or feels that the materials are helpful, Respondent is prepared to argue upon the extraneous matter.



The pretext of "maintaining order" cannot be used, either, for the suppression of speech; again, a rule of long-standing. Hague v. CIO, 307 U.S. 496, 516, 59 S.Ct. 954, 964 (1939) (note that Petitioner terms its parade license fees as "costs of ... policing use of its streets and property by those wishing to express their First Amendment views", Petition, p. 11).

PROPOSITION II

2. EXERCISE OF JUDICIAL DISCRETION WOULD NOT BE BENEFICIAL.

There is a split among the Sixth Circuit and Eleventh Circuits on whether an excess of nominal fees can be charged for First Amendment activities.[3]

---

[3] The split is actually between the Sixth and other circuits. Kaplan v. County of Los Angeles, 894 F.2d 1076 (9th Cir.1990), cert. den. 110 S.Ct. 2590 (1990), cited by Petitioner, did not involve speech at the quintessential public forum of a courthouse, as here, but rather a printed, paid, political advertisement in a publication for candidates.

However, issuing the Writ is not a right, but a matter of judicial discretion. Rules of the United States Supreme Court, Rule 10(1) (1990).

The Court may -- and should -- withhold its discretionary hand because the result reached below, as in this case, is right. Here, also, the Court may consider that the Eleventh Circuit Court of Appeals (formerly part of the Fifth Circuit) has a long tradition of dealing with disruptive, tumultuous and contentious public activities and that its decisions are well-respected in the field.

In addition, the rule sought by Petitioner would be chaotic. At present, apparently only two governmental units in the entire nation, Forsyth County, Georgia, and Columbus, Ohio, have deigned to charge fees[4] for First Amendment activity.

[4] Respondent would like Central Florida to be overruled, to the extent, if



The rule change sought by Petitioner could burden or abolish every form of at all, that it may permit the charging of a nominal fee. And, given the opportunity, Respondent would so argue, here. However, since this case does not squarely address the nominality issue -- but rather the issue is whether fees in excess of nominal fees may be charged -- denial of the Writ would offend neither long-standing practice nor precedent.

Respondent would, likewise, wish to overrule the line of authority which holds that regulation of speech must be content-neutral. Content-neutrality seems to have generated a kind of legal fiction, susceptible to misinterpretation and misapplication, with overtones even here.

Surely a conspiracy of sodomites to violate sodomy laws is as offensive to the public morals as a conspiracy of murderers to assassinate the president is to the public safety, notwithstanding that either group may stage a parade as part of its unlawful activities. Government should be empowered to curb both, but not to likewise restrain a march of Boy Scouts to honor the flag nor a parade of Nationalists to revere George Washington's Birthday.

Moreover, Respondents in no way align themselves with Petitioners in Stonewall Union v. City of Columbus, 931 F.2d 1130 (6th Cir.1991), cert. applied for, Docket No. 91-205. Would-be paraders there were homosexuals and their confederates; the practice of homosexuality or

citizen procession -- from Christmas parades and candlelight vigils to political protests and tickertape parades. Under Petitioner's fatally flawed argument, Lindbergh or MacArthur -- or their supporters -- could have been charged for their tickertape parades.

One shudders to think that Berliners would witness the erection of barricades against Americans lawfully and peacefully parading in the streets so soon after they have torn down the same barricades of their own.

CONCLUSION

It would seem that labeling a skunk a cat would have no effect on the odor.

Likewise, it is too late to label a free speech user tax as a "parade application fee" to camouflage its pernicious attack upon the right of free speech.

One wonders -- but not for long -- Would a poll tax have survived being labeled a "ballot box user fee"? No similar window dressing can disguise the instant free speech user tax, however, by incessant insistence that it is not a tax. "It is a license tax ... imposed on the exercise of a privilege granted by the Bill of Rights," Murdock v. Pennsylvania, 319 U.S. 105 at 113, 63 S.Ct. 870 at 875 (1943) (as to the Pennsylvania fee).

Murdock stated the rule ever so forcefully and matter-of-factly that when "the fee is not a nominal one," 319 U.S. 105 at 116-117, 63 S.Ct. 870 at 876, the First Amendment condemns it. Or, even more succinctly: "Freedom of speech, freedom of press, freedom of religion are available ... not merely to those who can pay their own way," Murdock, 319 U.S. 105,

---

sodomy is condemned in many jurisdictions as immoral and unlawful. Would-be paraders here are proponents of democracy and majority rule; as such, their methods and goals are traceable, commendably, to the Magna Carta and our Bill of Rights.

at 111, 63 S.Ct. 870, at 874 (emphasis added).

The case at bar is, in addition, a classic rearguing of the propriety of the "heckler's veto," already ruled upon, again and again, in all its many facets, by this Court.

Simply stated, if a citizen and, perhaps, a few of his supporters, are to stand on the courthouse steps or parade to the courthouse, scarcely as much attention and police supervision would be drawn as for a funeral procession, if as much.

But should the speaker or parader be "controversial" -- due to some public stance or speech -- and, thereby, attract threats or significant numbers in opposition, then simply by threatening violence or a rowdy mob, the opposition would cause an increase in police supervision and cost -- to the point that the would-be exerciser of First Amendment rights could not



"afford" the price tag of free speech. Hence, the odious "heckler's veto."

Such oppression and injustice is neither contemplated by the First Amendment nor by the time-honored decisions of this Court, for which reason -- together with those reasons hereinbefore set forth -- Respondent requests that the Writ of Certiorari be denied.

THIS the 26th Day of November, 1991.

Respectfully submitted,

_____
ATTORNEY FOR RESPONDENT

RICHARD BARRETT
Attorney for Respondent
PO Box 2050
Learned, Mississippi 39154
(601) 885-2288

CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, three true copies of the foregoing Respondent's Brief in Opposition to Robert Stubbs III, Attorney for Petitioner, at 110 Old Buford Rd., #200, Cumming, Georgia 30130.

THIS the 26th Day of November, 1991.

RICHARD BARRETT

No. 91-538

In The

# Supreme Court of the United States

October Term, 1991

FORSYTH COUNTY, GEORGIA,

*Petitioner,*

vs.

THE NATIONALIST MOVEMENT,

*Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

## BRIEF OF THE CITY OF ORLANDO AS AMICUS CURIAE SUPPORTING PETITIONER AND MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE SUPPORTING PETITIONER BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE AND THE NATIONAL LEAGUE OF CITIES

JODY M. LITCHFORD
Chief Assistant City Attorney
City of Orlando
400 South Orange Avenue
Orlando, FL 32801
(407) 246-2295
*Counsel for Amicus Curiae*
*City of Orlando*
*Counsel for Movants*
*International Association of*
*Chiefs of Police*
*National League of Cities*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 91-538

In The

# Supreme Court of the United States

October Term, 1991

FORSYTH COUNTY, GEORGIA,

*Petitioner,*

vs.

THE NATIONALIST MOVEMENT,

*Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

## MOTION OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE AND THE NATIONAL LEAGUE OF CITIES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The International Association of Chiefs of Police and the National League of Cities respectfully seek leave of this Court to join as amici curiae the amicus curiae brief filed by the City of Orlando, and as grounds therefor would state:

1. The International Association of Chiefs of Police consists of approximately 12,500 commanding officers of national, state, provincial, county, and municipal police agencies;

2. The National League of Cities is an organization consisting of more than 1400 cities and towns from all areas of the United States;

3. Pursuant to Supreme Court Rule 37, the movants have obtained permission to file as amici from the petitioner in this case, Forsyth County, Georgia. The Respondent, Nationalist Movement, has denied movants permission to file;

4. The question presented to this Court affects the interests of all police agencies and municipalities in the country;

5. Based on communication with Petitioner's counsel, movants believe that Petitioner's brief will be strictly limited to the facts of this case and will narrowly argue only the validity of the Forsyth County ordinance;

6. Movants wish to present this Court with facts and arguments addressed to the broader question of the propriety of assessing the actual costs of police services, provided those costs are calculated and imposed in a content-neutral and non-discriminatory manner;

7. The movants further wish to urge this Court to give local governments clear guidance on the extent to which they may permissibly regulate the costs necessarily involved in policing parade events.

**WHEREFORE**, the International Association of Chiefs of Police and the National League of Cities



respectfully request leave to join as amici curiae the brief of the amicus curiae City of Orlando.

Respectfully Submitted,

---

JODY M. LITCHFORD
Chief Assistant City Attorney
City of Orlando
400 South Orange Avenue
Orlando, FL 32801
(407) 246-2295
*Counsel for Movants*
*International Association of*
*Chiefs of Police*
*National League of Cities*

No. 91-538

In The

# Supreme Court of the United States

October Term, 1991

FORSYTH COUNTY, GEORGIA,

*Petitioner,*

vs.

THE NATIONALIST MOVEMENT,

*Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

## BRIEF OF THE CITY OF ORLANDO AS AMICUS CURIAE SUPPORTING PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES





TABLE OF AUTHORITIES – Continued

## INTEREST OF THE AMICUS CURIAE

The City of Orlando is a municipal corporation organized and existing under the laws of the State of Florida, and a political subdivision thereof. This brief is filed pursuant to Supreme Court Rule 37.5 on behalf of the City of Orlando by an authorized law officer of the City. Orlando's parade permit ordinance was declared unconstitutional by the Eleventh Circuit in *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986). Orlando subsequently amended its ordinance to conform to the Eleventh Circuit's ruling. Pursuant to its amended ordinance, Orlando issues approximately 40 parade permits each year for the use of its public thoroughfares. These events include parades celebrating various secular and religious holidays, sports events, charitable endeavors, as well as the traditional communication of political views. Police costs associated with these events, for barricading the streets and sidewalks for the exclusive use of event participants and for the control and redirection of traffic at barricaded intersections and affected roadways, varies depending on the length and duration of the event. In 1991, costs for the 42 parades ranged from $0 for events requiring no special services, to $5,618.93 for an event involving multiple streets and lasting for three hours.

Although this Court has not addressed the parade permit issue for more than 50 years, cities, towns, and local police agencies throughout America continually face decisions involving such events and the appropriate allocation of scarce municipal resources. The interest of the amicus and movants is in encouraging this Court to decide the instant case in a fashion that will give local

governments clear guidance on the extent to which they may permissibly regulate the costs necessarily involved in policing parade events. The amicus and movants further urge this Court to resolve the issues in this case in a manner appropriately vesting in the affected governmental agency authority for managing and allocating its financial and human resources.

## SUMMARY OF ARGUMENT

The Forsyth County, Georgia, ordinance at issue in the instant case is virtually identical in effect to the ordinance upheld by this Court in *Cox v. New Hampshire*, 312 U.S. 569 (1941). It requires persons seeking parade permits to pay the actual police costs incidental to the permitted activity and caps that fee at an amount substantially less in today's economic times than the cap upheld in *Cox*.

Nothing in the First Amendment to the United States Constitution requires that the government subsidize expressive activity. Provided the regulation is content-neutral, leaves open ample alternative means of communication, and is narrowly tailored to serve a significant government interest, an ordinance requiring persons to bear the necessary incidental costs concomitant to their choice of the means or forum they use to advance their views does not violate the Constitution.



## ARGUMENT

### I. A parade ordinance allowing a municipality to require payment of limited costs necessary to police an event involving expressive activity is consistent with this Court's established precedent in *Cox v. New Hampshire*, 312 U.S. 569 (1941).

The question presented in this case is whether a county parade ordinance requiring payment of a permit fee based on the actual cost of administration of the permit and the maintenance of public order during the event, up to the sum of $1000 per day, is constitutional; or whether, conversely, as the Eleventh Circuit has ruled, the First Amendment to the United States Constitution allows no more than "nominal" fees to be imposed on any expressive activity.

This Court last addressed this issue directly over fifty years ago in the case of *Cox v. New Hampshire*, 312 U.S. 569 (1941). At issue in *Cox* was a city parade permit scheme which allowed a fee of up to $300.00 to be required for the use of public streets. In upholding the constitutionality of the fee, the Court noted that:

> [t]he authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need.

*Id.* at 574.

The Court in *Cox* went on to hold the license fee in that case, which ranged from $300 to a nominal amount and took into account the expense of policing the event, to be constitutionally permissible.

In more recent decisions, however, the circuit courts of appeals have split on the continued viability of the *Cox* decision and the corresponding ability of local governments to impose other than nominal charges on persons or groups involved in expressive activities. The Eleventh Circuit, in *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986), followed by its decision in the instant case, has held that the First Amendment permits no more than a nominal fee to be charged for the use of a public forum for public issue speech. In reaching this conclusion, the Eleventh Circuit found that this Court's decision in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), a decision invalidating as a tax a flat license fee applied to residential solicitors, limited all City imposed fees on expressive activity to a nominal amount. The Eleventh Circuit ruling leaves local governments with the Hobson's choice of either attempting to distinguish protected expressive activity from other activities on an event-by-event basis for the purpose of imposing costs or, alteratively, burdening the public fisc with the costs of all such special events.

The other courts of appeals which have considered this issue have not interpreted *Murdock* so broadly.[1] Both

[1] This narrower reading is supported by the fact that the *Murdock* opinion itself referenced *Cox* with no indication of disagreement with that decision.



the Ninth and the Sixth Circuits have held that public entities are free to charge their actual costs associated with First Amendment activities and that there is no constitutional requirement that such charges be nominal only. *Stonewall Union v. Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 116 L.Ed.2d 227 (1991); *Kaplan v. Los Angeles*, 894 F.2d 1076 (9th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2590, 110 L.Ed. 271 (1990); see also *Baldwin v. Redwood City*, 540 F. 2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).

The ordinance under attack in the instant case is virtually identical in effect to the ordinance upheld by this Court in the *Cox* decision. It requires persons seeking parade permits to pay the actual police costs incidental to the permitted activity and caps that fee at an amount substantially less in today's economic times than the cap upheld in *Cox*.[2]

[2] Because the standard is so nebulous, it is all but impossible to make any meaningful comparison between Forsyth County's $1000.00 fee and the $300.00 benchmark in *Cox*. $300.00 compounded annually at four percent (4%) interest for a period of fifty years is $2,132.00 and at six percent (6%) interest is $5,526.00. This illustrates the difficulty in the use of the term "nominal" to define permissible fees or indeed in upholding any particular sum as constitutionally permissible at a particular point in time. Municipalities need more enduring guidance on the appropriateness of the direct costs that can legally be shifted to the users of their streets and byways for expressive purposes.

## II. A parade ordinance allowing a municipality to require payment of the costs necessary to police an event involving expressive activity is permissible under the First Amendment to the United States Constitution.

Without question, city streets and sidewalks are, by definition, traditional public forums for the purpose of the exercise of expressive activities. *Frisby v. Schultz*, 487 U.S. 474 (1988); *United States v. Grace*, 461 U.S. 171 (1983). Regulations, therefore, imposing fees or costs in conjunction with the issuance of a parade or assembly permit for the use of city streets or sidewalks should be analyzed in the same manner as any other government regulation of a traditional public forum. As this Court has repeatedly held, reasonable time, place, and manner restrictions on expressive conduct are permissible "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. Grace*, 461 U.S. 171 (1983). Government regulations imposing fees or costs which meet these standards do not violate the First Amendment and should be upheld.[3]

[3] An ordinance which fails to meet all of these standards, for example is not content-neutral because it takes into account the nature of the speech, must pass strict scrutiny and may only be upheld if justified based on a compelling state interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988).



Provided that an ordinance such as Forsyth County's is content-neutral[4] and leaves open ample alternative means of communication[5], it is constitutionally consistent so long as it is narrowly tailored to serve a significant governmental interest.

There should be no question but that the government's interest in ensuring public safety and maintaining the orderly flow of pedestrian and vehicular traffic on public thoroughfares is significant. As this Court has repeatedly affirmed, "[g]overnmental authorities have the duty and responsibility to keep their streets open and

[4] In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court interpreted the content-neutral requirement as meaning without regard to content as well as not based on any disagreement with the message. As applied to the cost of parade events, a content-neutral regulation would impose costs based solely on objective factors related to the logistics of the event, such as its length and duration, and would be consistently applied regardless of the nature of the event. Under this definition, the Forsyth County ordinance appears to be constitutional on its face.

[5] Per *Frisby v. Schultz*, 487 U.S. 474, 483 (1988), an ordinance leaves open ample alternative means of communication so long as "the ordinance permits the more general dissemination of a message." In the City of Orlando, which is undoubtedly representative of other municipalities across the nation, persons or groups can express their views by public speech, the carrying of signs, or the distribution of brochures on the streets and sidewalks or in public parks without restriction so long as they obey traffic and criminal laws and do not request the exclusive use of a public area. Because parade permit regulations like those in Forsyth County and the City of Orlando burden only one limited means of expression, leaving open ample alternative channels of communication, they meet this First Amendment standard.

available for movement." *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Walker v. Birmingham*, 388 U.S. 307, 315 (1967) ("We have consistently recognized the strong interest of state and local governments in regulating their streets and other public places"). The justification for governmental regulation is particularly compelling when the expressive use of the streets or sidewalks is inconsistent with the ordinary use of these thoroughfares. See *Grayned v. Rockford*, 408 U.S. 104, 116 (1972). Under such circumstances, government involvement is essential for traffic control and public safety.

An ordinance advancing these significant governmental interests is considered "narrowly tailored" and hence consistent with the First Amendment provided it is reasonably related to governmental objectives and is not unnecessarily overbroad. The ordinance need not be the least restrictive conceivable means of meeting the government's goals, but need only be legitimately designed to advance those goals. *Ward v. Rock Against Racism*, 468 U.S. at 800.

The proponents of expressive activity do not have a constitutional right to express their views whenever and however they choose. *United States v. Grace*, 461 U.S. 171 (1983); *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965). Local governmental entities have the freedom as well as the responsibility to make regulations governing the safe use of their streets and sidewalks. So long as ample alternative means are available for communication of views and ideas, the government should be free to regulate public thoroughfares in a nondiscriminatory fashion for the good of all citizens.



Chief among any government's duties to its citizens is an obligation to conserve and allocate precious governmental resources. Control of fiscal and human resources is properly a matter of local governmental discretion. While a local government may choose to bear all the costs associated with closing a public street, sidewalk, or other public property for a particular purpose, it may choose to require that the actual costs of such an event be paid by the group or individual seeking that peculiar use. So long as that decision is not made in a discriminatory fashion, nor vested in someone with unbridled discretion[6], the First Amendment should not operate to deny governments this right. Provided the group or individual has the choice of various communicative means but wishes to use a particular forum, the costs of that choice are not required by the Constitution to be vested upon the taxpayers responsible for the chosen forum.

---

[6] An ordinance affecting expressive activity which vests discretion in the permitting authority without concomitant limits or standards would be constitutionally impermissible. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). Ordinances with fairly explicit standards, such as those in the ordinance at issue in *Stonewall Union v. Columbus, supra*, should be sufficient to pass constitutional muster. Ordinances are not required to be written with perfect precision and may allow some exercise of police judgment without violating the First Amendment. *Grayned v. Rockford*, 408 U.S. 104, 114 (1972). Alternatively, the existence of a reasonable cap, such as the $1,000 cap imposed by Forsyth County, on the allowable fees (based on anticipated actual costs), can constitute a sufficient limitation for First Amendment purposes. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

This premise is entirely consistent with unrelated but analogous decisions of this Court dealing with the question of whether the government has any obligation to subsidize constitutionally protected activity. In a case where petitioners challenged the denial of a tax deduction for money spent on lobbying, this Court held that petitioners were not "being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do . . . ". *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

In *Harris v. McRae*, 448 U.S. 297, 316 (1980), the Court upheld a law affecting abortion funding and stated,

> it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in Maher: although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.

In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court rejected a challenge to the anti-lobbying restrictions on organizations granted tax-exempt status pursuant to section 501(c)(3) of the I.R.S. Code. The Court identified the tax-exempt status as a government subsidy, but ruled that the First Amendment did not require the government to subsidize lobbying. The Court emphatically rejected the "notion that First



Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan*, 461 U.S. at 546, citing *Cammarano*, 358 U.S. at 515. The Court went on to note that "[w]e have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right . . . ". *Regan*, 461 U.S. at 549.

There is no material difference between the federal government's decision not to subsidize political expression through the tax laws or the federal government's decision not to subsidize family planning choices and a decision by a local government not to subsidize political expression through the contribution of police services. Nothing in the Constitution exempts groups or individuals involved in expressive activities from bearing the economic consequences of the choices they make with regard to those activities. Nor does anything in the Constitution require that the taxpayers subsidize the choices a group makes as to the methodology it employs to communicate its views – decisions which the taxpayer does not participate in making. If there is a cost attached to certain services, the Constitution does not prohibit governments from requiring that all persons desiring to use those services pay for their actual cost.

At issue in the instant case is whether local governments are required by the First Amendment to subsidize the costs associated with the expressive activities an individual or group chooses to conduct in a particular fashion, by the extraordinary use of a street, sidewalk, or other public property. Based on the *Cammarano*, *Harris*, and *Regan* decisions, this question must be answered in the negative. As this Court held in *Cammarano*, so long as

these individuals or groups are only being required to pay the actual costs involved in the use of their chosen forum, and so long as these costs are calculated and imposed in a reasonable, non-discriminatory fashion, such regulation is constitutionally permissible.

On this basis, the ordinance enacted by Forsyth County at issue in this case does not violate the First Amendment to the Constitution and must be upheld.

## CONCLUSION

For the foregoing reasons, amicus curiae hereby urges this Court to reverse the en banc decision of the Eleventh Circuit Court of Appeals and uphold the right of local governments to assess groups or individuals seeking parade permits the actual cost of necessary police services so long as these charges are assessed in a constitutionally consistent manner.

Respectfully Submitted,

JODY M. LITCHFORD
Chief Assistant City Attorney
City of Orlando
400 South Orange Avenue
PO Drawer 1151
Orlando, FL 32801
(407) 246-2295
*Counsel for Amicus Curiae*
*City of Orlando*

No. 91-538

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1991

---

FORSYTH COUNTY, GEORGIA,
Petitioner,

v.

THE NATIONALIST MOVEMENT,
Respondent.

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

# JOINT APPENDIX

RICHARD BARRETT
P.O. Box 6700
Jackson, MS 39212
(601) 373-4400

McVAY & STUBBS
Robert S. Stubbs III*
J. Richard Neville
*Counsel of Record
Forsyth Prof. Bldg.
Suite 200
110 Old Buford Rd.
Cumming, GA 30130
(404) 889-6045

---

PETITION FOR CERTIORARI
FILED SEPTEMBER 27, 1991
CERTIORARI GRANTED JANUARY 10, 1992

DOCKET ENTRIES

United States District Court

| | |
|---|---|
| January 19, 1989 | Complaint, Motion for Temporary Restraining Order filed by Nationalist Movement. R-1 |
| January 23, 1989 | Order denying Motion for Temporary Restraining Order. Appendix, Pet. for Cert. @ 1 |
| January 25, 1989 | Judgment Entered for Forsyth County against Nationalist Movement. R-8 |
| May 19, 1989 | Notice of Appeal by Nationalist Movement. R-22 |
| October 2, 1990 | United States Court of Appeals for the Eleventh Circuit. Order of Panel of Eleventh Circuit Reversing U.S. District Court as to Forsyth County. Appendix, Pet. for Cert. @ 18. |

| | |
|---|---|
| December 18, 1990 | Order of Eleventh Circuit vacating Panel Decision and Granting En Banc Rehearing.<br>Appendix, Pet. for Cert.@ 45 |
| July 5, 1991 | Order of En Banc Eleventh Circuit Reinstating Panel Decision.<br>Appendix, Pet. for Cert. @ 47 |

All appendix items deemed relevant by the parties are found in the Appendix to the Petition for Certiorari.

No. 91-538

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1991

---

FORSYTH COUNTY, GEORGIA,
Petitioner,

v.

THE NATIONALIST MOVEMENT,
Respondent.

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

# BRIEF FOR PETITIONER

KING & SPALDING
Gordon A. Smith
Dan H. Willoughby, Jr.

191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

McVAY & STUBBS
Robert S. Stubbs III*
J. Richard Neville
*Counsel of Record
Forsyth Prof. Bldg.
Suite 200
110 Old Buford Rd.
Cumming, GA 30130
(404) 889-6045

## QUESTION PRESENTED

Whether the First Amendment to the United States Constitution limits the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum or whether the amount of the license fee may take into account the actual expense incident to the administration of the ordinance and the maintenance of public order in the licensed activity, up to a maximum sum of $1,000.00 per day of the activity?

## LIST OF PARTIES IN COURT BELOW

The Nationalist Movement
Forsyth County, Georgia
City of Cumming, Georgia
Forsyth County Board of Education



## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes





## REFERENCES TO OPINIONS IN COURTS BELOW

Nationalist Movement v. City of Cumming, Forsyth County, Georgia, and Forsyth County Board of Education, 913 F.2d 885, vacated, 921 F.2d 1125 (1990), reinstated, 934 F.2d 1482 (11th Cir. 1991) (en banc).

Nationalist Movement v. City of Cumming, Forsyth County, Georgia, and Forsyth County Board of Education, C.A. File No. 2:89-CV-06-WCO (N.D.Ga., January 23, 1989).

## STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction is invoked pursuant to the provisions of 28 U.S.C. § 1254(1), as Petitioner Forsyth County, Georgia is a party to a civil case where an adverse judgment was rendered by the United States Court of Appeals for the Eleventh Circuit on July 5, 1991. Petition for Certiorari was filed September 27, 1991.



## CONSTITUTIONAL PROVISIONS AND LOCAL ORDINANCES

Amendment I to the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 3, subsection (6) of Forsyth County Ordinance No. 34, as amended:

(6) Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed. In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax.

The full text of Ordinance 34 is attached at Petition for Certiorari Appendix ("P.C. App.") @ 98-126.

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1991

---

No. 91-538

---

FORSYTH COUNTY, GEORGIA,

Petitioner,

v.

THE NATIONALIST MOVEMENT,

Respondent.

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

# BRIEF FOR PETITIONER

---

## STATEMENT OF THE CASE

At issue in this case is the constitutionality of a county ordinance designed to defray the costs of parades and rallies held on public property. The particular ordinance at issue, Ordinance 34, was adopted in direct response to enormous expenses incurred by Petitioner

Forsyth County, Georgia, in administering and policing prior events. In essence, Ordinance 34 imposes a limited user fee for parades and rallies held on public property. The amount of the fee is calculated solely by reference to content-neutral factors: the additional costs actually incurred by the county in administering and policing the event. In addition, regardless of the actual cost incurred, the fee charged may not exceed $1,000.00 per day.

Respondent The Nationalist Movement ("the Movement"), a white supremacist group, challenged the constitutionality of Ordinance 34 after being assessed a $100.00 fee for a permit for use of the Forsyth County Courthouse steps for a rally against the Martin Luther King, Jr. holiday. The Movement claimed that the fee provision of Ordinance 34 violated the First Amendment both in its application (i.e. the actual $100.00 fee charged to Respondent) and on its face (i.e. the potential $1,000.00 fee). The district court rejected the Movement's challenge, finding that Ordinance 34 was constitutional both as applied and on its face. P.C. App. @ 11-14. The court of appeals reversed, concluding that the First Amendment permitted the assessment of only a nominal fee under a county parade ordinance and that Ordinance 34's potential $1,000.00 fee was unconstitutional on its face. P.C. App. @ 31.

## 1. STATEMENT OF FACTS.

### A. The Origin of Ordinance 34.

In January of 1987, Forsyth County had no parade ordinance, because prior to 1987 the only parade of any



size in Forsyth County was the annual 4th of July parade, which required little administrative time or security. Two Saturdays in 1987 changed that forever.

On Saturday, January 17, 1987, Hosea Williams, an Atlanta civil rights personality, led approximately 90 marchers to Forsyth County to stage a "brotherhood anti-intimidation" demonstration. P.C. App. @ 75-80. Some 400 counter-demonstrators threw bottles and rocks at the marchers and Mr. Williams promised a return demonstration. Id. That demonstration occurred on the following Saturday, January 24, 1987, when approximately 20,000 marchers joined Mr. Williams for his return demonstration. P.C. App. @ 81-94. Mr. Williams and the marchers were again met by approximately 1000 counter-demonstrators who, during this demonstration, were controlled by more than 1700 National Guardsmen activated to police the march and maintain public order. Id.

In response to Mr. Williams' activities, the Movement's predecessor and affiliate, The Forsyth County Defense League ("the Defense League"), (R-3-35-37; Hg. Tr. @ 35-37), began to voice its white supremacist views by staging a rally on the Forsyth County Courthouse steps in March, 1987. P.C. App. @ 137-139. Approximately 125 participants rallied with the Defense League and were met by over 200 counter-demonstrators. Id.

**B. The Movement.**

Based on stricken testimony [1] before the District Court and upon assertions from its counsel and chief executive officer, Richard Barrett, [2] the Movement appears to be a corporation which: organizes public speeches, forums and debates; is supported by donations; has no paid members or officials; has no income which inures to the benefit of its members or officials; has income of approximately $300.00 per month expended primarily for postage, printing and communication of its message; has physical assets encompassing flags, supplies and printed material of nominal value; and had cash on hand as of January 19, 1989, of less than $100.00. See The Movement's Petition for Certiorari in The Nationalist Movement v. The City of Cumming, Forsyth County, Georgia and Forsyth County Board of Education, Case No. 90-933, cert. denied, January 14, 1991, @ 5; (R-3-54-56; Hg. Tr. @ 54-56). The Movement or the Defense League has demonstrated in Forsyth County and Atlanta, Georgia on four separate occasions: March 14, 1987 (P.C. App. @ 137-140), January 23, 1988 (P.C. App. @ 144-146), during the 1988 National Democratic Convention in Atlanta (R-3-39; Hg. Tr. @ 59) and in January 1989, at the State Capitol in Atlanta (R-3-61; Hg. Tr. @ 61). The Movement assumably has held rallies in locales other than Georgia (R-3-62; Hg. Tr. @ 62). The Movement's message, succinctly put, is "to provide for majority rule in the United States." (R-3-63; Hg. Tr. @ 63).

During the eventful year of 1987, the Movement or the affiliated Defense League spread their message in Forsyth County without hindrance - indeed, with the cooperation Forsyth County affords all of its citizens. The community room at the Forsyth County Courthouse was made available for meetings and debates. P.C. App. @ 130, 132, 157, 159, 160, 171, 177, 180, 186. Newsletters were circulated. P.C. App. @ 129, 174, 184. Meetings were held at private homes, P.C. App. @ 151, 167, and at other public places within Forsyth County. P.C. App. @ 174. Commercial ventures designed to spread the Movement's message were initiated. P.C. App. @ 130, 175. Thus, the Movement and its affiliate have been and are free to pursue "ample alternative channels for communication of the[ir] information", Clark v. Community for Creative Non-violence, 468 U.S. 288, 293

---

1 The testimony was stricken after the district court determined that the Movement's counsel's use of a straw man as "Acting Secretary" of the Movement to facilitate the presentation of evidence constituted an attempt to perpetuate a fraud upon the court. P.C. App. @ 6. This finding of fraud on the Court was affirmed by the Eleventh Circuit. P.C. App. @ 40.

2 "Barrett is a Founder and Principal in the Nationalist Movement which has been a highly visible and extremely controversial political group. While its membership is apparently small, its radical politics has attracted much attention and it has vigorously asserted constitutional rights under the First Amendment as in the matter brought before Judge O'Kelley." In Re: Richard Barrett, 260 Ga. 903, 903, 401 S.E. 2d 255, 256 (1991).

(1984), in both public and private facilities in Forsyth County.

**C. The Enactment of Ordinance 34.**

As a direct result of the cost incurred by the first two demonstrations, P.C. App. @ 75-94, the second of which cost local and state government almost $700,000.00 to police, P.C. App. @ 95-97, the Forsyth County, Georgia, Board of Commissioners ("the Board") enacted Ordinance 34 on January 27, 1987, "to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes...." P.C. App. @ 98. The Board was authorized by state law, Ga. Code Ann. § 36-1-20 (Michie 1987), to enact the ordinance. The Board recognized in findings accompanying the enactment of Ordinance 34 that "private organizations and groups of private persons have from time to time sought to use public property and public roads within the jurisdiction of the Board of Commissioners of Forsyth County for private purposes...and [that] such uses have included parades, assemblies, demonstrations, road closings, and other related activities...." P.C. App. @ 99. The Board also recognized that "it is in the public interest that such uses not interfere unduly with the right of citizens not participating therein nor endanger the public safety nor obstruct the orderly flow of traffic." P.C. App. @ 100. Most importantly, the Board recognized from vivid experience that "the cost of necessary and



reasonable protection of persons participating in or observing said [activities] exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible...." P.C. App. @ 100. Finally, the Board noted that the cost of additional protection could be estimated and that any surplus collected could be refunded to those seeking a permit. P.C. App. @ 100.

Ordinance 34 was amended on June 8, 1987 after the initial three demonstrations to provide a maximum amount on the fee that might be assessed by the County Administrator. The purpose of the amendment was to allay concerns regarding the constitutionality of the ordinance. P.C. App. @ 118. Sub-section (6) of section 3 of amended Ordinance 34 capped the amount of such a fee at "not more than $1,000.00 for each day such [licensed activities] shall take place." P.C. App. @ 119. In addition, the County Administrator was empowered by the amended ordinance to "adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." Id. The quoted language was borrowed directly from this Court's opinion in Cox v. New Hampshire, 312 U.S. 569, 577 (1941), to ensure that Ordinance 34 came well within the limits allowed by this Court's pronouncements of First Amendment law.

**D. The Issuance of the Movement's Permit.**

This action arose as a result of a permit issued to the Movement in 1989 pursuant to the provisions of amended Ordinance 34. The Movement sought a permit to conduct a parade and demonstration expressing opposition to the Martin Luther King, Jr. federal holiday. P.C. App. @ 18. Approximately 200 participants were anticipated. P.C. App. @ 16. The Movement proposed to assemble in the local high school parking lot and march two blocks along a city street to a proposed rally on the county courthouse steps. P.C. App. @ 19. After one and one half to two hours of speeches, the demonstrators were to march back to the school and caravan to downtown Atlanta for a rally at the State Capitol. Id. The permit from the county dealt only with the rally on the courthouse steps. Separate applications were submitted to the Board of Education and the City of Cumming for the use of the school parking lot and city street, respectively. P.C. App. @ 19.

The permit was issued by the Forsyth County Administrator contingent upon payment of a $100.00 permit fee. [3] The amount of the fee resulted from a

---

[3]
Q. Mr. Major, you have been presented with an application from the Nationalist Movement for an assembly on the courthouse grounds, it that correct?
A. Yes, sir.

Q. What has been your action with regard to that request?



deliberate undervaluation of the expense incurred by a single county official, the County Administrator, in administering the ordinance. [4] The amount of the fee

---

A. We issued the permit on December the 30th with the condition that they pay the $100.00 application fee and that the audio systems be at a low volume as to not -- to disturb the businesses surrounding the courthouse square and the convalescent home residents and the member -- people visiting the convalescent home directly across the street from the courthouse. (R-3-134; Hg. Tr. @ 134).

[4]
Q. So, if you earn $1,000.00 a week, what's your hourly -- how many hours are you supposed to work a week?
A. Well, it's based on a 40-hour work week.

Q. It's based on a 40-hour work week. So, 40 into 1000 is $25.00 an hour?
A. Yes, sir.

Q. Is basically what you get paid?
A. Yes, sir.

Q. And you say at the time you set the $100 fee you had approximately 10 hours effort in this?
A. Yes, sir.

Q. So, you deliberately undervalued your time, is that correct?
A. Yes, sir.

Q. Had you studied whether or not any fee had been set in the past with regard to the Nationalist Movement or the Forsyth County Defense League or other entities in which Mr. Barrett has been involved in aiding yourself in setting this fee?
A. Yes, sir. I believe I did review an application that was submitted the prior year. I believe it had the $100 fee on it also.

did not include any calculation whatsoever for expenses incurred in the "maintenance of public order" by law enforcement authorities who would police the rally. [5] The Movement refused to pay the fee, did not

---

Q. So, this fee is no different than the previous application fee required by a previous administrator?
A. No, sir.
R-3-137-138 (Hg. Tr. @ 137-138).

5
Q. Now, prior to setting the $100 fee did you and I have discussion about how much that fee should be?
A. Yes, sir. I believe we had a meeting on 12-28, 12- 29, sir.

Q. What do you recollect about how we were to come up with the amount of the fee?
A. You advised me to establish a reasonable fee based on the contents of the actual work that I personally had knowledge of.

Q. Does anybody else deal with the applications for parade permits in Forsyth County?
A. There was other people involved other than myself.

Q. Who?
A. Yes, sir.

Q. Who?
A. You've got the clerical support, staff people, you've got law enforcement agencies.

Q. Have you calculated in any credit for the time spent by law enforcement authorities to prepare Forsyth County, or is this $100 purely based on your time and your clerical support staff?
A. It's purely based upon my time, sir.
(R-3-136; Hg. Tr. @ 136); see also (R-3-135; Hg. Tr. @ 135); P.C. App. @ 147-150.



demonstrate, and brought this action in the United States District Court for the Northern District of Georgia in Gainesville. Joint Appendix @ 1; Respondents Brief in Opposition to Petition for Certiorari @ 3.

## 2. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

### A. The District Court Proceedings.

On January 19, 1989, the Movement filed suit in the United States District Court, Northern District of Georgia, Gainesville Division, against Forsyth County, Georgia, seeking a temporary restraining order enjoining Forsyth County from interfering with the Movement's plans to conduct a rally on the Forsyth County Courthouse grounds in Cumming, Forsyth County, Georgia, on January 21, 1989. R-1-1. The Movement also requested a declaratory judgment that Ordinance 34 was unconstitutional because it charged an administrative permit fee to those desiring to parade and rally in Forsyth County. R-1-1. Jurisdiction in the district court was based upon 28 U.S.C. §§ 1331,1343, 2201, and 2202.

After a hearing on the merits, the district court (O'Kelley, C. J.) held that Ordinance 34 was neither unconstitutional on its face nor as applied to the Movement and denied the request for injunctive and declaratory relief. P.C. App. @ 11-14. The district court explained that in order to succeed with a facial challenge to Ordinance 34, the Movement must establish that the ordinance is either "unconstitutional in every conceivable

application or that it seeks to prohibit such a broad range of protected conduct that it is overbroad." P.C. App. @ 11- 12. A statute is overbroad "when there is a realistic danger that it will significantly compromise recognized First Amendment protection of parties not before the court." Id. at 12. These factors were not established by the Movement. Overall, the district court viewed Ordinance 34 as a reasonable regulation of time, place and manner. Relying on Cox, 312 U.S. at 576, the district court reasoned that the imposition of a limited user fee to meet the actual cost of processing an application for a parade permit was quite consistent with the First Amendment and did not render Ordinance 34 unconstitutional on its face. The district court also concluded that, in light of the efforts expended by the county in processing the Movement's application for a permit, Ordinance 34's $100.00 content-neutral, cost-based fee did not, as applied, violate the First Amendment rights of the Movement.

**B. The Court of Appeals Proceedings.**

The Movement noted its appeal on May 17, 1989. R-2-22. The Eleventh Circuit Court of Appeals reversed, concluding that the ordinance was facially unconstitutional. In so ruling, the Eleventh Circuit relied upon its own recent circuit precedent, Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1521 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986), which limited the authority of local government to impose user fees in the context of marches and rallies



using public facilities and thoroughfares. The essence of the Central Florida decision was that such user fees could not exceed a "nominal amount." The Eleventh Circuit did not define the "nominal amount" concept in Central Florida or in its opinion in this case. Presumably costs beyond that nominal amount are to be absorbed by local government since such costs may not be passed onto the persons seeking the use of the public forum. Thus, according to the Eleventh Circuit, it is unacceptable that a user fee is assessed on a content-neutral, actual-cost basis. Such a fee must also satisfy certain normative requirements with respect to the size of the fee. The Nationalist Movement v. The City of Cumming, 913 F.2d 885, 891 (11th Cir. 1990); P.C. App. @ 31.

Applying the rule of Central Florida to Ordinance 34, the Eleventh Circuit concluded that the potential $1,000.00 fee was not, regardless of the size of the proposed event and regardless of the actual cost to the County, a nominal amount. The Eleventh Circuit did not explain the basis for this conclusion. Rather, it simply concluded that the $1,000.00 maximum amount was "enough to hold" the ordinance unconstitutional on its face.[6]

---

6 The Court did not address the Movement's argument concerning Ordinance 34's indigency provisions or its argument that the Ordinance was applied in an unconstitutional manner. P.C. App. @ 31, fns. 8 & 10.

Circuit Judge Fay concurred specially. He noted Judge Henderson's concurrence in Central Florida and agreed with Judge Henderson that the majority in Central Florida misread this Court's pronouncements in Cox and Murdock v. Pennsylvania, 319 U.S. 105 (1943), as prohibiting the assessment of fees based upon the cost of ensuring public safety and keeping the peace. P.C. App. @ 42. While recognizing his obligation to concur in the judgment in this case based on binding circuit precedent in Central Florida, Judge Fay suggested a modification of the Central Florida decision by the en banc court. Id. He continued by noting that "[a] $1,000.00 fee for the costs associated with processing the application and policing a parade and rally designed to use the city's main street and the county courthouse square for a period of one and a half to two hours strikes me as being extremely nominal." P.C. App. @ 43. Judge Fay concluded by citing Kaplan v. County of Los Angeles, 894 F.2d 1076, 1081 (9th Cir.) cert. denied, 110 S.Ct. 2590 (1990), in which a panel of the Ninth Circuit approved "reasonable" charges that "fairly reflect costs incurred by the municipality in connection with an activity involving expression."

Forsyth County filed its Suggestion of Rehearing En Banc on October 22, 1990, which was granted by the Eleventh Circuit on December 18, 1990, and which vacated the panel decision. Nationalist Movement v. City of Cumming, 921 F.2d 1125 (11th Cir. 1990); P.C. App. @ 47. On July 5, 1991, the en banc Eleventh



Circuit reinstated the panel decision. Nationalist Movement v. City of Cumming, 934 F.2d 1482 (11th Cir. 1991); P.C. App. @ 47-48.

Three judges dissented from the panel decision for the reasons set forth in Judge Fay's special concurrence. P.C. App. @ 74. Two additional judges dissented from the panel holding that Ordinance 34 was facially invalid, P.C. App. @ 48, but concurred in the panel holding that this Court's decisions in Cox and Murdock limit fees to a nominal amount. P.C. App. @ 66. Thus, nine judges of the Eleventh Circuit interpret Cox and Murdock to authorize only nominal fees and four (including Senior Judge Henderson, who concurred in Central Florida) do not.

Chief Judge Tjoflat issued a separate opinion concurring in part and dissenting in part from the majority opinion. P.C. App. @ 48. He viewed Ordinance 34 as facially valid but concluded that a remand was appropriate to determine if the actual $100.00 fee assessed was nominal "relative to the necessary fees incurred by the County and the applicant's resources." P.C. App. @ 73. Judge Tjoflat held that there was no error in the district court's finding that the fee was not assessed based on the content of the Movement's message but that the district court failed to determine whether Ordinance 34 provided for a nominal fee. P.C. App. @ 72.

The Petition for Certiorari was filed in this Court on September 27, 1991, and granted on January 10, 1992.

## SUMMARY OF THE ARGUMENT

Respondent Nationalist Movement lacks standing to mount a facial challenge to Ordinance 34. The Movement's challenge complains of lack of adequate discretionary standards within Ordinance 34 which would guard against misuse of the ordinance fee by the Forsyth County Administrator. Because such an overbreadth challenge presents an opportunity for a litigant in a First Amendment case to avoid normal standing requirements, such a challenge is not generally allowed when a limiting construction can be placed on an ordinance attacked as overbroad.

Ordinance 34 was written to comply with this Court's decision in Cox v. New Hampshire, 312 U.S. 569 (1941), and contains the limiting construction placed on the Cox statute when that statute was reviewed by the New Hampshire Supreme Court and approved by this Court. Because this limiting construction found in Cox has been explicitly written into Ordinance 34, an overbreadth challenge is inappropriate and the Movement lacks standing to challenge the Ordinance's facial constitutionality.

In the First Amendment context, a properly limited license fee related to administration of the Ordinance and the maintenance of public order represents an accommodation of freedom of speech with the needs of the community to protect that speech and not unduly burden the public fisc. No decision by this Court has limited user fees to a nominal amount, and the



Eleventh Circuit's interpretation of this Court's decision in Murdock v. Pennsylvania, 319 U.S. 105 (1943), to the contrary is erroneous. That case was concerned with a tax on the privilege to engage in First Amendment activity and the distinction between such a tax and a user fee was recognized by this Court in Murdock.

The Eleventh Circuit is the only Circuit Court of Appeals which has failed to recognize the distinction between the tax in Murdock and the user fee in Cox. Furthermore, the Eleventh Circuit has without any apparent basis taken away the right of local government to obtain reimbursement for administration and policing costs which are incurred in protecting those using government property for expression. The application of the Ordinance before the Court was reasonable, was not based on the content of the Movement's message, and was in express compliance with this Court's decision in Cox.

Ordinance 34 is a classic application of user fees which are permitted by the Constitution in various contexts, including intergovernmental immunities, the dormant Commerce Clause and First Amendment cases. Such user fees have been distinguished in each of these constitutional settings from taxes because such user fees, regardless of their label, are permitted as long as the fees do not discriminate against constitutionally protected activities, are based on a fair approximation of the use caused by the activity, and are structured to produce revenues that would not exceed the cost to the

government for the benefits which it supplies. These considerations distinguish user fees from taxes which are simply revenue raising devices which may not be assessed for the privilege of engaging in constitutionally protected activities.

Neither Ordinance 34 nor this Court's opinion in Cox are out of line with more recent time, place and manner decisions of this Court. There is no serious argument that the fee is other than content-neutral, that it does not serve a significant government interest (i.e. protecting the public fisc and public order), or that alternative channels of communication were not and are not available to the Movement to spread its message. Therefore, the fee is a legitimate element in the County's exercise of its police power to impose reasonable restrictions on the time, place and manner the Movement may exercise its First Amendment privilege. Ward v. Rock Against Racism, 491 U.S. 781 (1989).



## ARGUMENT

### I. THE MOVEMENT LACKS STANDING TO MOUNT A FACIAL CHALLENGE TO THE ORDINANCE BECAUSE ORDINANCE 34 IS NOT OVERBROAD.

#### A. Facial Overbreadth Claims Attacking Statutes Which Purport to Regulate Time, Place, and Manner Restrictions Fail Where a Limiting Construction of the Statute Is Possible.

The Movement attacks Ordinance 34 as facially unconstitutional because it allegedly does not "prescribe carefully tailored standards for the Administrator when he (1) reviews applications for permits and (2) sets permit fees." P.C. App. @ 49. An overbreadth claim represents an exception to this Court's ordinary requirement that the party attacking a statute have standing to complain about the harm done by the statute as applied to him. See generally, Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) and cases cited therein. The exception allows a First Amendment litigant to challenge a statute without the requirement that the litigant show harm by the application of the statute. Id. at 612. But the facial overbreadth doctrine is not to be "involved when a limiting construction has been or could be placed on the challenged statute." Id. at 613, citing, inter alia, Cox. As Justice White has so succinctly put it,

> Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort.

Broadrick, 413 U.S. at 613.

For that reason, the Movement is required to show that Ordinance 34 is "substantially overbroad" by demonstrating that a "substantial number of instances exist in which the law cannot be applied constitutionally." New York State Club Association v. City of New York, 487 U.S. 1, 14 (1988). As discussed below, Ordinance 34 contains strict limitations and a $1,000.00 limit which affirmatively negate such a showing.

**B. Ordinance 34 Is Not Facially Overbroad Because It Incorporates the Very Limitations Approved by This Court in Cox.**

The relevant language of Ordinance 34 is substantially analogous to the language in the statute at issue in Cox. Section 3(6) of Ordinance 34 states:

> Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air meeting shall take place.



The analogous language from the New Hampshire statute at issue in Cox states:

> Every licensee shall pay in advance for such license, for the use of the city or town, a sum not more than three hundred dollars for each day such licensee shall perform or exhibit, or such parade, procession or open air public meeting shall take place...N.H. P.L., Chap. 145, Section 4.

The Supreme Court of New Hampshire construed its statute to be a fee "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." State v. Cox, 91 N.H. 137, 16 A.2d 508, 513 (1940), cited in, Cox, 312 U.S. at 577. Ordinance 34 incorporates this limiting construction from Cox with the following language in Section 3(6):

> The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.

Because New Hampshire's statute passed constitutional overbreadth muster in Cox based on the Supreme Court of New Hampshire's limiting construction, and that limiting construction has been explicitly incorporated into Ordinance 34, only an express overruling of Cox would allow the Eleventh Circuit's decision in this case to stand.

This is especially so when the "First Amendment overbreadth doctrine allows a challenge only if the law is substantially overbroad." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 508 (1985) (O'Connor, J., concurring), citing, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798-801 (1984) (emphasis added). Given the express limitations within Ordinance 34 combined with the $1,000.00 limit, the Movement cannot reasonably argue that a "substantial number of instances exist in which the law cannot be applied constitutionally." New York State Club Association, 487 U.S. at 14 (1987) (emphasis added). Ordinance 34 operates within narrow confines and simply does not allow the type of unbridled discretion which can support a valid First Amendment attack. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).

Accordingly, the County respectfully requests that this Court reverse the Court of Appeals' holding that Ordinance 34 is unconstitutional on its face and find that the Movement lacks standing to mount an overbreadth challenge because of adequate standards within Ordinance 34 to guide the County Administrator in setting a fee.

## II. PERMIT FEES RELATED TO EXPENSE INCIDENT TO ADMINISTRATION OF THE ORDINANCE AND THE MAINTENANCE OF PUBLIC ORDER ARE PROPER TIME, PLACE AND MANNER RESTRICTIONS.



### A. Cox Strikes the Proper Balance Between Freedom of Speech and the Reasonable Interests of the Community.

In one of the early cases in which this Court defined the rights of its citizens to utilize public areas to express views on issues of the day, the Court made it clear that the exercise of that right has limits which must be regulated in the interest of all.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. C.I.O., 307 U.S. 496, 515-516

(1939) (Plurality Op., Robert, J.) (emphasis added).

In 1941, the Court applied Justice Robert's reasoning to a New Hampshire statute which allowed cities to "investigate and decide the question of granting licenses" and to "specify the day and the hour of [a] permit to perform [licensed activities]." Cox, 312 U.S. at 571-572, fn. 1. The statute also permitted municipalities to require a licensee and to "pay in advance for such license, for the use of the city or town, a sum not more than three hundred dollars for each day [of the activity]." Id. at 572, fn. 1 (emphasis added). In affirming convictions of Jehovah's Witnesses who failed to apply for a permit before they engaged in their activities, this Court stated:

> If a municipality has authority to control the use of its public street for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation the other proper uses of the streets.

Id. at 576 (emphasis added).

The Court in Cox then addressed the license fee and noted that the Supreme Court of New Hampshire observed that the "range [of the fee] is from $300 to a nominal amount[,]" unlike the Eleventh Circuit, clearly recognizing a distinction between $300 and a "nominal



amount." [7] State v. Cox, 91 N.H. 137, 16 A.2d 508, 513 (1940); Cox, 312 U.S. at 576. The New Hampshire court also noted that the license fee took into account the extent of public expense anticipated by the activity for which the fee was requested and that the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." State v. Cox, 16 A2d at 513; Cox, 312 U.S. at 577. In concluding this Court's review of the fee aspect, Chief Justice Hughes stated:

> There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. ...[W]e perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

Cox, 312 U.S. at 577.

The decision in Cox by this Court recognizes that when local government provides venues for expressive activity, the government incurs costs for policing those activities so that they may safely occur. The Court also implicitly recognized that to properly police such an

---

7 Three hundred dollars in 1953, the earliest year the Consumer Price Index was calculated, equalled $1,329.12 in 1989, the time the Movement applied for its permit under Ordinance 34. CPI Detailed Report, January, 1989, U.S. Dept. of Labor Statistics, Table 3 at 13.

activity, the local government must have adequate information to make determinations as to the extent of traffic control, security personnel, sanitary facilities and other like concerns in order to make an intelligent choice when it devises a plan for accommodating the users of government property.

In order to obtain that information, a licensing procedure is necessary. Such a procedure necessarily implies the need to issue permits as a symbol that appropriate information has been provided and responsible governmental choices have been made in response to the application for a permit. The process of receiving the application, processing it, coordinating it with others involved in devising appropriate plans for handling the requested activities, and issuing the permit itself takes up time and causes expense to any government administering such a licensing scheme. The Court simply has recognized this legitimate approach and its attendant costs and has mandated that government may recover those costs as long as the rights protected by the Constitution remain unimpaired.

The County simply asks this Court to maintain what this Court asserted in 1941: that government has certain responsibilities to those wishing to utilize its property for expressive purposes and, similarly, those wishing to express themselves have a responsibility to share the expense, within reasonable limits, as long as that fee is directly related to the costs which they cause



government to incur. Shared responsibility underlies the entire discussion, as it should.

**B. Ordinance 34 Incorporates Virtually the Same Time, Place and Manner Restrictions as Those Approved in Cox.**

This Court's opinion in Cox created a benchmark in the evolution of the time, place and manner doctrine when it stated that a local government "cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the...proper uses of the streets." Id. at 576. The language in Cox concerning unfair discrimination has matured as shown by one of this Court's most recent enunciations of the time, place and manner doctrine:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward, 491 U.S. at 791 (1989) (citations omitted)

Applying the analysis of Ward to Ordinance 34, it is clear that the fee aspect of the ordinance is content-neutral. The enactment of the fee aspect of Ordinance 34 resulted from Forsyth County's concern

with the cost of the repeated demonstrations in the county which were plundering its treasury. See, Statement of Facts, supra at 6. Thus, the "predominate" and, indeed, "motivating" concern in mandating a fee was to recoup at least a part of the costs incident to these demonstrations. Ward, 491 U.S. at 791, citing, Renton v. Playtime Theaters, 475 U.S. 41, 47-48 (1986). The Movement does not seriously dispute this fact but opposes any fee for any purpose. See Respondent's Brief in Opposition to Petition for Certiorari @ 4, fn. 4.

The County also has a substantial interest in recouping a portion of the costs expended in hosting demonstrations. Any recovery would satisfy, in part, the County's recoupment goal. "The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." City Council of Los Angeles, 466 U.S. at 805 (1983), citing, Berman v. Parker, 348 U.S. 26, 32-33 (1954) (emphasis added). Governmental entities must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. Ordinance 34, including its fee provision, is narrowly tailored to affect only those activities which produce unwanted secondary effects (i.e. extraordinary costs). Renton, 475 U.S. at 52.

Further, ample alternative channels of communication with which to spread the Movement's message have been and are available to the Movement and its affiliate, the Defense League. See Statement of Facts supra at 5. The requirement of a permit only arises



if demonstrations or parades on "public property or public roads in the unincorporated areas of Forsyth County..." are sought. P.C. App. @ 103. This restriction does not limit the Movement's right to demonstrate or rally on city property, city streets, or on private property, all of which the Movement or its affiliate has done, or to hold regular free meetings in county courthouse meeting rooms. See Statement of Facts supra at 5.

Communication is equally effective at a rally or meeting held on city or private property or in a county courthouse meeting room as on county courthouse steps or county roads. Merely because an applicant for a permit desires free access to a particular forum for communication does not entitle him to the award of such right. He is entitled to the forum, but not necessarily without cost. "The inquiry for First Amendment purposes is not concerned with economic impact." Renton, 475 U.S. at 54, citing, Young v. American Mini-Theaters, 427 U.S. 50, 78 (1976) (Powell, J., concurring).

The evolution of the modern time, place and manner decisions has revealed the inherent wisdom of Cox. As long as the regulations are applied evenly and equally to everyone (i.e. are content-neutral), and the regulations serve legitimate and significant government interests (i.e. reimbursement for policing and administrative costs) and as long as there is freedom to express the ideas desired in alternative forums if there is reluctance to comply with the regulations (i.e. alternative

channels of communication), then a time, place and manner regulation, such as Ordinance 34, offends no constitutional protections.

**C. The Application of Ordinance 34 to the Movement Was Eminently Reasonable and Well Within the Guidelines Set by This Court's Decision in Cox.**

This Court should not lose sight of the fact that the permit was available to the Movement in this case upon their payment of $100.00 as opposed to the potential maximum fee of $1,000.00 under Ordinance 34. See Statement of Facts supra at 8. The $100.00 was calculated based on the time spent by the County Administrator for his time in processing the application, coordinating with other county officials, and communicating with the Movement and its representatives. See Statement of Facts supra at 9-10. The $100.00 fee represented an intentional reduction of the amount otherwise appropriate to reimburse the County for the time spent by the Administrator dealing with the Movement's application for a permit.[8] Therefore, any concern that the content of the Movement's message resulted in an enhanced fee is groundless; in fact, the Administrator and the County bent over backwards in an effort to be as fair and equitable with the Movement's requests as Ordinance 34

---

8 See U.S. v. Codd, 527 F.2d 118 (2d Cir. 1975).



would permit. This concern with fairness resulted in the amount being set at the same amount as was previously assessed against the Movement when they had requested a permit the previous year. See Statement of Facts supra at 9, fn. 4.

Forsyth County went to great lengths when adopting Ordinance 34, particularly its fee aspect, in order to draft it in a form which would be clearly acceptable to any court reviewing it pursuant to a First Amendment challenge. In applying Ordinance 34 to the Movement, the county attempted to avoid violating Eleventh Circuit precedent, which it felt at the time was out of line with this Court's holding in Cox. See Central Florida, supra. In order to avoid any accusation of application of Ordinance 34 based on content, the fee was deliberately reduced below an amount which would have been valid based on the time spent by the County Administrator. Indeed, only the Administrator's time and no clerical staff time was used to calculate the amount of the fee. Notwithstanding all of these efforts, and perhaps as a result of the naivete of county officials, the Movement has attacked Ordinance 34 because the potential $1,000.00 maximum fee, although less in actual value than the $300.00 maximum fee in Cox would have totalled in 1989, has been held to be other than a "nominal amount" by the Eleventh Circuit; the Movement has attacked the actual fee because they say that the $100.00 amount, little as it is, reflects the county's disagreement with its message; and, worst of all,

the case from this Court upon which the fee provision is based, Cox, is attacked as outmoded, out of date, and of suspect validity in view of modern free speech decisions. See Central Florida, 774 F.2d at 1522.

The County contends that if any of these asserted weaknesses are upheld by this Court, then local government will be at the mercy of those who wish to spread their message at any time, at any place, and at a limitless cost to local government. The County does not expect this Court to leave local government in that position and urges this Court to reaffirm the wisdom and validity of Cox and any ordinance enacted based on its reasoning and within its restrictions.

**D. Murdock Does Not Limit Permit Fees to a Nominal Sum And Does Not Prohibit Assessment of a Permit Fee to Offset Costs Incident to the Administration of Ordinance 34.**

In 1943, two years after this Court approved regulatory fees in Cox, this Court reviewed an ordinance of the City of Jeannette, Pennsylvania, which required solicitors or persons delivering various types of merchandise to procure a license to transact said business and pay a set fee based on the duration of the solicitations or deliveries. Murdock v. Pennsylvania, 319 U.S. 105 (1943). Petitioners in that case were, as in Cox, Jehovah's Witnesses. They went about the City of Jeannette distributing literature and soliciting people to purchase certain religious books and pamphlets



published by the Watch Tower Bible and Track Society. None of the Petitioners had obtained a license under the ordinance and were arrested after sales of books.

Justice Douglas, writing for a five justice majority, determined that such activities constituted evangelism which was entitled to protection under the First Amendment to the United States Constitution. Murdock, 319 U.S. at 108. Having made that determination, Justice Douglas stated that the case presented a single issue: "The constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." Id. at 110 (emphasis added). Justice Douglas found that the tax under consideration was analogous to a tax on a preacher for the privilege of delivering a sermon. Id. at 112. He determined that the tax imposed was a "flat license tax, the payment of which is a condition of the exercise of ....constitutional privileges." Id. Justice Douglas expressly recognized that the fee being reviewed was not a nominal fee "imposed as a regulatory measure to defray the expenses of policing the activities in question." Id. at 114. He noted that "[i]t is in no way apportioned." Id.

The Court concluded that "the present ordinance is not directed to the problems with which the police power of the State is free to deal." Id. at 116. Justice Douglas explicitly noted that, "as we did in Cox v. New Hampshire, supra, and Chaplinsky v. New Hampshire, [315 U.S. 568 (1942)], [we do not review] state regulation

of the streets to protect and insure the safety, comfort, or convenience of the public." Id. And, in the language which has caused the issue before the Court in this case, Justice Douglas stated:

> and the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors. See, Cox v. New Hampshire, supra, 312 U.S. at pgs. 576, 577.

Murdock, 319 U.S. at 116-117.

Justice Douglas took great care to distinguish the holding in Murdock from the regulatory fee approved in Cox. In Murdock, the Court was faced with a flat tax operating as a revenue raising measure on an activity the Court found was protected expression. The Court in Murdock freely acknowledged the difference between such a flat fee taxing protected expression and a sliding fee to defray the cost of administrative and policing costs on publicly owned property. The use of the word "nominal" was unfortunate but is wholly unrelated to the holding in Murdock. In sum, Murdock does not modify the Court's holding in Cox but recognizes that Cox involved a different kind of fee necessitated by obligations cast upon government by those wishing to engage in expressive conduct on public property.

**E. The Eleventh Circuit Is Out of Step With the Proper Reasoning Applied by Other Circuit Courts of Appeals.**



With the exception of the Eleventh Circuit Court of Appeals, every circuit court facing the issue presented by this case has recognized the distinction between the tax struck down in Murdock and the fee in Cox. See South Suburban Housing Center v. Board of Realtors, 935 F.2d 868, 989 (7th Cir. 1991), reh'g denied, 1991 U.S. App. Lexis 20783 (7th Cir. 1991), cert. denied, 60 U.S.L.W. 3520 (1992), (city failed to affirmatively demonstrate the specific costs it incurred in administrating its ordinance regulating "for sale" signs meant that there was not the required relationship between the permit fee and the ordinance's purpose); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1136 (6th Cir. 1991) (no evidence that the fees were charged for anything other than processing costs and traffic control or that the fees were excessive or unreasonable), cert. denied, 112 S.Ct. 275 (1991); Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983) (license fee invalidated because plaintiffs failed to show that the fee charged was equal to the administrative costs incurred); Fernandez v. Limmer, 663 F.2d 619, 633 (5th Cir. 1981) (licensing fee to be used in defraying administrative costs is permissible if not in excess of costs of administration), cert. dismissed, 458 U.S. 1124 (1982); Baldwin v. Redwood City, 540 F.2d 1360, 1372 (9th Cir. 1976) ("In some circumstances a city may both require a permit for activity involving free expression without violating the First Amendment and also collect fees that fairly reflect

costs incurred by the city in connection with such activity."), cert. denied, 431 U.S. 913 (1977). See also Kaplan, 894 F.2d 1076 (9th Cir.) cert. denied, 110 S.Ct. 2590 (1990).

The Eleventh Circuit is simply out of step with jurisprudence regarding this issue. This Court should reaffirm its holding in Cox, which many circuit courts have properly construed in order to maintain the authority of local government to charge reasonable fees for the administrative and policing costs associated with the utilization of public property for expressive purposes.

Apparently, the Eleventh Circuit simply chooses to ignore the authority granted to local governments by this Court in Cox to offset policing costs by the assessment of fees for uses of public property for expressive purposes. Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986). The Eleventh Circuit is apparently concerned a fee charged for policing, even though facially content-neutral, might not be applied in a content-neutral manner because of the enhanced cost associated with policing expressive activity which would generate potentially violent reactions from those not receptive to the message of the demonstrators. See Central Florida, 774 F.2d at 1524-1525. This concern recognizes the classic "heckler's veto" of which the Movement complains so loudly. However, contrary to the ordinance considered by the Eleventh Circuit in Central Florida, Ordinance 34 limits fees to no more



than $1,000.00, an amount already held to be reasonable by this Court in Cox. See fn. 7, supra at 25. In fact, the Movement was only charged a $100.00 fee in this case.

The Sixth Circuit Court of Appeals in Stonewall Union properly rejected an attack on a Columbus, Ohio ordinance which allowed that city to assess fees for expected police activities relating to traffic control. While affirming the Columbus ordinance, the Sixth Circuit stated that it "has repeatedly rejected the restriction of expression protected by the First Amendment based on a fear of violence." Stonewall Union, 931 F.2d at 1135. Like the Columbus ordinance, Ordinance 34 simply is not concerned with the content of any speech. It only requires payment of a fee for reimbursement of policing costs and administrative costs related to the expression of ideas by the applicant for a permit. As this Court has stated, as long as alternative channels of communication are available, there is nothing to restrict a permit fee to offset the costs as approved by this Court in Cox. Ward, 491 U.S. 781 (1989).

Ordinance 34 imposes a responsibility for payment for costs incurred in administering the application for a license permit and policing the activity itself, without imposing a prohibition upon the expression of views, regardless of their conduct. Thus, there can be no finding that Ordinance 34 is unconstitutional because the license fee might be based in part upon fear of violence from those who disapprove of the speaker's

message in the activity licensed. This is especially true given the $1,000.00 cap on the license fee which was incorporated into Ordinance 34 consistent with this Court's guidance in Cox.

The County's position is bolstered by this Court's language in Ward, 491 U.S. at 791, where this Court noted that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Governmental regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech." (citations omitted).

In conclusion, Ordinance 34 is facially constitutional because it tracks this Court's observations and commands in Cox, is content-neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication of information. Ward, 491 U.S. at 791.

**F. The Concept of User Fees Has Been Recognized by This Court in Such Diverse Constitutional Settings as Intergovernmental Immunities, the Dormant Commerce Clause and First Amendment Cases.**

This Court recently applied the principles set down in Cox to another constitutional context. In Massachusetts v. United States, 435 U.S. 444 (1978), the State of Massachusetts brought a constitutional claim



asserting that the assessment of the annual registration tax on all civil aircraft flying in the navigable air space of the United States, as applied to aircraft owned by the State and used exclusively for police functions, violated the immunity of State government from federal taxation. The tax was proportional in that it was based on the type and weight of the aircraft and, while expected to produce only modest revenues, was considered by Congress to be an integral and essential part of the network of user charges. Id. at 450-451. This Court determined that the tax operated as a user fee and could constitutionally be applied to the state as long as the fee was closely related to the federal interest in recovering costs from those who benefit and since it effected no greater interference with state activities than did numerous restrictions which this Court had approved in the past. Id. at 461-462.

> A government body has an obvious interest in making those who specifically benefit from its services pay the cost and, provided that the charge is structured to compensate the government for the benefit conferred, there can be no danger of the kind of interference with constitutionally valued activity that the [Supremacy and Commerce] Clauses were designed to prohibit.

Id. at 462-463.

The Court's reference to the Commerce Clause refers to a line of cases best represented by

Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc., 405 U.S. 707 (1972), where the court approved a one dollar head tax on enplaning commercial air passengers in the face of an attack brought pursuant to the Commerce Clause. The Court upheld that user fee since it was designed to recoup the cost of airport facilities.

The distinction recognized by this Court between a fixed user fee and a flat tax assessed without regard to cost of services provided distinguishes the decisions in Massachusetts v. United States, Evansville-Vanderburgh Airport and Cox from the decision in Murdock. The Court in Murdock recognized this distinction. Murdock, 319 U.S. at 113 (a license tax imposed for the "privilege" of carrying on interstate commerce or engaging in activity protected by the First Amendment is prohibited). A fixed fee will be upheld as long as there is no discrimination against constitutionally protected activities (state functions, interstate commerce or First Amendment freedoms), the fee is based on a fair approximation of the use caused by the activity and is structured to produce revenues that would not exceed the cost to the fee assessor for the benefits



supplied by it. Massachusetts v. United States, 435 U.S. at 464-467.[9]

The user fee concept, although offensive in principle to those who desire unbridled freedom to say anything they want anywhere they wish, is a valid concept which supports and maintains the principle initiated by this Court in Cox: that local government may impose regulations in order to assure the safety and convenience of its citizens in the use of its property in order to safeguard the good order upon which civil liberties ultimately depend. Cox, 312 U.S. at 574. Therefore, the analogy of the Cox principles to user fees approved by this Court in Massachusetts v. United States and Evansville-Vanderburgh Airport Authority is relevant, appropriate, and serves a secondary basis for upholding Ordinance 34 as facially constitutional.

## III. CONCLUSION

For the reasons stated, Forsyth County respectfully requests that this Court reverse the decision of the Eleventh Circuit holding Ordinance 34 unconstitutional on its face, hold that Ordinance 34 is constitutional as applied to the Movement, and remand

---

9 Petitioner notes that the Sixth Circuit in Stonewall Union upheld a flat administrative fee of $85.00 assessed against anyone requesting a permit which required administrative effort on behalf of the city. The court there found that the permit, although a flat fee, was directly apportioned to the administrative costs of processing the permit application. Stonewall Union, 931 F.2d at 1133. In any event, there is no flat fee assessed by Petitioner pursuant to its Ordinance.

this case to the Eleventh Circuit Court of Appeals with directions to affirm the opinion handed down by the United States District Court for the Northern District of Georgia.

Respectively submitted this 14th day of February, 1992.

KING & SPALDING
Gordon A. Smith
Dan H. Willoughby, Jr.

191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

McVAY & STUBBS
Robert S. Stubbs III
J. Richard Neville
Counsel of Record
Forsyth Prof. Bldg.
Suite 200
110 Old Buford Rd.
Cumming, GA 30130
(404) 889-6045

No. 91-538

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FORSYTH COUNTY, GEORGIA
Petitioner

v.

THE NATIONALIST MOVEMENT
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF FOR RESPONDENT

RICHARD BARRETT
P.O. Box 2050
Learned, Mississippi 39154
(601) 885-2288
Attorney for Respondent

## QUESTION PRESENTED FOR REVIEW

Should the ruling of the Eleventh Circuit Court of Appeals that a parade license fee of up to $1,000.00 per day violates the First Amendment -- on the grounds that such a charge exceeds a nominal sum -- be sustained by the Supreme Court?

## STATEMENT OF SUBSIDIARIES

The Nationalist Movement has no present subsidiaries or affiliates that are not intregal parts thereof.



## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES PAGE

STATUTES







CONSTITUTION

No. 91-538

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FORSYTH COUNTY, GEORGIA
Petitioner

v.

THE NATIONALIST MOVEMENT
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF FOR RESPONDENT

## STATEMENT OF THE CASE

Respondent, The Nationalist Movement, is a pro-majority organization -- a

non-profit, charitable corporation [P.C. App. 8] -- which held a parade and rally in Cumming, Georgia, in January, 1988, about the courthouse square, to call for pro-majority reforms and to express opposition to the Martin Luther King Holiday. No fees were paid. It applied to Petitioner, Forsyth County, Georgia, and other governmental bodies to hold a similar parade and rally on January 21, 1989 [P.C. App. 18-19].

Petitioner interposed its parade ordinance -- originally adopted in January, 1987, and subsequently amended on June 8, 1987 -- for the January, 1989 parade, requiring up to a $1,000.00 per day fee, to which Respondent objected. The City denied use of its streets for the parade and the school denied use of its grounds for a rally and speeches [P.C.



App. 19-21].

Respondent, at the time, had approximately $90.59 cash assets in its bank account and supplies of flags and printed matter of nominal value [P.C. App. 8].

On January 19, 1989, Respondent sought declaratory and injunctive relief against Petitioner, charging, inter alia, that Petitioner's parade ordinance, which allowed the license fee of up to $1,000.00 per day, was facially unconstitutional, in violation of the First Amendment [P.C. App. 21].

The District Court held that the ordinance was not unconstitutional; the fee was not paid and the rally and parade were not held. The ruling was appealed and, on October 2, 1990, reversed by the Eleventh Circuit Court of Appeals, holding that an "ordinance which charges more than

a nominal fee for using public forums for public issue speech, violates the First Amendment." [P.C. App. 31]. On rehearing en banc, the ruling in favor of Respondent was upheld [P.C. App. 47-48].

## SUMMARY OF THE ARGUMENT

Petitioner's de novo contention that Respondent lacks standing is treated by showing that Respondent is, indeed, the actual party in interest and that the tests for challenging an overbroad statute have been met. Objection is made, alternatively, to Petitioner's raising this new issue for the first time in this Court.

Respondent relies generally upon Murdock v. Pennsylvania, 319 U.S. 105 (1943), relied upon, also, by the Appeals'



Court, for the proposition that a free speech user fee can be, at best, nominal and that the instant $1,000.00 per day fee exceeds such constitutional limitation.

Respondent traces the history of the Stamp Act to illustrate that whether the odious measure is characterized as a "tax" or "fee" does not save it from being a restraint on liberty. Neither can Petitioner's characterizations of the charge as a requisite for police, trash clean up or administration resurrect it.

Respondent submits that the site of the rally -- the seat of government, county courthouse steps, quintessential, traditional public forum -- is crucial here, given the severe resrtriction on government to limit speech and assembly in such a key domain of democracy.

Modern constitutional doctrine is

examined, showing that the progression since Murdock has been to disallow charges and restraints on protected First Amendment activities. Alternatively, it is submitted that the Court may wish to disallow, at its option, parade application fees, nominal or otherwise, altogether, along the lines of its reasoning in poll tax and voting cases.

Murdock, itself, is delineated for its impact upon the earlier case relied upon by Petitioner, as well as for its logic and comportment with justice and national policy.

Petitioner's argument that alternate channels of expression substitute for assembly at the seat of government are examined -- notwithstanding that Petitioner attempts to support its position by reliance upon materials not of record



objected to by Respondent -- and found to be wanting. Speech and assembly are shown to be inseparably intertwined, heightening the importance of assembly at the traditional public forum, even if meeting in private homes or handing out flyers elsewhere were possible.

It is shown that the contention that other circuits are in disagreement is unfounded, insofar as others which have imposed free speech user fees have done so in non-public forum settings, distinguishable from the case at bar. One maverick case which might have bolstered Petitioner was remanded for equal protection considerations, where it likely will be reversed, with little precedential value.

Content neutrality claims are examined and faulted because of the potential for abuse. How would officials justify

"sliding scale" charges for police protection for celebrities? Controversial public figures? Poor people? Particularly in light of safety and police protection being a right, not a mere grant or whim of government, for those exercising the First Amendment.

Finally, the free speech permit is held up to the canvas of public policy, where, as a rationale for notice of public activity alone, it seems to blend in. As a license with a nominal fee, it is less harmonious. But as a $1,000.00 charge, it leaves too-indelible a blot on the fabric of the American Way of Life.



## ARGUMENT

### I. RESPONDENT HAS STANDING

#### A. RESPONDENT IS THE ACTUAL PARTY IN INTEREST

Respondent has standing to challenge the $1,000.00 parade application fee.

Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973), cited by Petitioner in support of its allegation that Respondent lacks standing,[1] concerns individuals who claimed, inter alia, that a rule was overbroad which prohibited wearing of

[1] It would appear that Petitioner has violated Rule 24, .1(a), Rules of the Supreme Court (1990), which provide that the brief may not raise additional questions already presented in its Petition for Writ of Certiorari (the question of standing was not raised heretofore by Petitioner, for which reason the point should not be considered, here). However, if the Court, at its option, under the Rules, considers the new point to correct a plain error, Respondent is prepared, as here, to argue the point.

political buttons and using political bumper stickers. They admitted, however, that they, themselves, did not engage in such activity, Broadrick, 413 U.S. at 609-610, so the court rightly held that they lacked standing. Here, however, Respondent is the one seeking the parade permit and who, because of its poverty, was unable to pay the fee to hold its rally at the Forsyth County seat of government.

B. OVERBREADTH TESTS ARE MET

In First Amendment cases, as here, "overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive and communicative conduct," Broadrick, 413 U.S. at 613. Insofar as Petitioner asserts that Respondent has "ample alternative channels for communication" -- other than at a



rally in front of the courthouse -- (such as by means of meetings in private homes and circulation of newspapers)[2], Petitioner must necessarily concede that the manner and place of expression is impacted by its ordinance, meeting Broadrick tests.

Petitioner's claim that there is no indication that "a substantial number of

---

[2] See, e.g. Brief for Petitioner, p. 5.

Note that the challenged ordinance, by its terms, defines the requisite place: the "open air public meeting," Brief for Petitioner, p. xi, further satisfying Broadrick's requirement that an overbreadth claim treat a statute which regulates place (outdoors rally in front of the courthouse, rather than a gathering in an indoors community room), as well as manner (oratory before a crowd -- the classic "stump speech" -- rather than discussion in private homes or articles written in a newspaper), inter alia.

Note, also, that other public places for assembly, the school and the city streets, were ruled off limits to Respondent's proposed rally, as well, P.C. App. 20-21, by the school and the city.

instances exist" in which the law cannot be applied constitutionally, in reliance upon New York Club Ass'n v. New York City, 487 U.S. 1, 14 (1988), likewise falls.

Petitioner concedes that Respondent has rallied previously at the same locale with approximately 125 people, Brief for Petitioner, p. 3, and that some 200 people were expected for the January, 1989 rally, Brief for Petitioner, p. 8, which, because of the fee dispute, never took place. Petitioner, also, avers that Respondent's parades and rallies, at the site in question, in opposition to the King Holiday, are "frequent," "annual" and "perennial" [Petitioner's Brief on Appeal to the Appeals Court, p. 10].

Given hundreds involved in frequent, annual and perennial activities petitioning government, at the seat of government,



with public issue speech on a recurrent theme, a requisite, substantial number of instances are shown -- not only for Respondent but for the many others[3] seeking to attend its events -- where the law cannot be applied constitutionally.[4]

## II. A $1,000.00 FREE SPEECH USER FEE VIOLATES THE MURDOCK CONSTITUTIONAL REQUIREMENT THAT SUCH A CHARGE BE, AT MOST, NOMINAL

---

[3] Petitioner, also, notes that others, besides Respondent, have conducted "open air" marches and demonstrations for First Amendment purposes within the jurisdiction of Petitioner, Brief for Petitioner, p. 3, and that, including counter-demonstrators, such activities have involved thousands of people.

[4] Cf. e.g. City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (law overbroad when it seeks to prohibit too broad a range of protected conduct); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 967-68 (1984) (statute overbroad if it creates an unnecessary risk of chilling protected speech).

## A. WHETHER TERMED A "FEE" OR A "TAX", THE FREE SPEECH USER CHARGE CANNOT STAND

Whether a sum collected by government is a "tax" or a "revenue enhancement" may, with tongue in cheek, be debated by politicians; whether a fee charged by government for assembly of the people is a "tax" or a "user fee" may, with stickling detail, be delineated by lawyers. But whether a permit fee to deliver a public speech is an abridgment of liberty or an advancement of the First Amendment should be, with eyes uplifted to Justice, the province of the Justices.

The Appeals Court found that an ordinance charging up to $1,000.00 for free speech activities in public parks and upon public streets exceeded the constitutional requirement that such a charge be



at most nominal.[5] P.C. App. 48.

Petitioner had no qualms about its reason for enacting the fee. The "permit fee serves to rid the public forum of ... unwelcome harassment" [Petitioner's Brief on Appeal to the Appeals' Court, p. 10].

> Presumably, a demonstrator's unwillingness to pay the required fee suggests that his motives for demonstrating are lacking in honest intent or that his ... speech [is] unimportant and deficient...." Id.

This stance seems to echo the opening message of Queen Anne to Parliament in 1712 in which she observed

---

5 "Nominal," according to Black's Law Dictionary, 946 (5th Ed.1979), is:

> [n]ot real or actual; merely named, stated or given, without reference to actual conditions; often with the implication that the thing named is so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to a name.

> how great license is taken in publishing false and scandalous libels such as are a reproach to any Government. This evil seems to be grown too strong for the laws now in force. It is therefore recommended to you to find a remedy equal to the mischief.[6]

Consequently, Parliament quickly enacted the Stamp Act, which exacted a duty on all paper to which printing was affixed. An Act for Levying Special Duties, etc., 1712, 10 Anne ch. 19, §§ 101, 118.

This Court has observed that "the Revolution really began when in 1765 the home Government sent the stamps for newspaper duty to the American colonies," Grosjean v. American Press Co., 297 U.S. 233, 246 (1936).

---

6 Stewart, John Lennox and the Greenock Newsclout: A Fight Against the Taxes on Knowledge, 15 Scot. Hist. Rev. 322, 325 (1918).



Did the colonists object to the stamps as a "tax" or as a restraint on liberty?

John Adams combined both objections and condemned both as part of

> a design ... to strip us, in great measure, of the means of knowledge, ... with restraints and duties.[7]

Respondent, likewise, condemns the fee at hand as an impermissible "free speech user fee," a tax on speech and a restraint on liberty.

True, it could have been argued in 1765 that the stamp fee was only imposed upon the paper, itself, and that by paying the small, even nominal, sum, the writer could express himself as he chose.

---

7 Adams, Our Blood-Bought Liberty, 1 Great Debates in American History, 36 (M. Miller ed. 1913) (emphasis added).

But, happily, the American Revolution changed that view.

And, as a result, the First Amendment came to enshrine freedom of speech, assembly and petition.

Notwithstanding, it is argued -- belatedly in 1992 -- that the free speech user fee is only imposed on the courthouse steps and that by paying $1,000.00 the people can assemble, speak and petition to their heart's content. [See Brief for Petitioner, p. 37]: the ordinance

> imposes a responsibility for payment ... for a license permit ... without imposing a prohibition upon the expression of views....

Respondent is not charged, of course, with threatening to engage in obscene utterances, subversive speech or even "fighting words." Merely with being "unimportant," "deficient" and somehow



"harassing" to government officials, presumably by criticizing them.

### B. NO CHARACTERIZATIONS CAN SAVE THE FREE SPEECH USER FEE

Petitioner does concede that its ordinance is "badly worded" [R3- -208]. So, to cloak its cold and sterile mannequin -- perhaps even to disguise its broken and ragged limbs -- it drapes a coat of many colors around it.

Its fee, it says, was, actually, the result of "counsel from the county attorney" [R3- -152], [R3- -136]. Or, the administrator's "personal time" [R3- -135]. Or, what the administrator "felt to be" a "reasonable" fee [R3- -139]. Also ascribed is the supposed need to

"maintain order" [R3- -214],[8] "take care of the county's administrative load"[9] [R3--214] or collect trash [R3- -145].

C. THE SITUS OF THE TRADITIONAL PUBLIC FORUM IS CRUCIAL

The Appeals' Court drew attention to "traditional public forums," which Petitioner does not treat at all in his Brief,

---

[8] A doctrine of long standing has been, however, that the pretext of "maintaining order" cannot be used for the suppression of speech, Hague v. CIO, 307 U.S. 496, 516 (1939). Likewise, as to the "heckler's veto", or threats of violence, see, e.g. Gooding v. Wilson, 303 F.Supp. 942 (N.D. Ga.), appeal dismissed, 396 U.S. 112 (1969), aff'd 431 F.2d 885 (5th Cir. 1970), 405 U.S. 518 (1972) (mere public inconvenience, annoyance or unrest are not sufficient to bridle freedom of speech); Brandenberg v. Ohio, 395 U.S. 444 (1969); Terminello v. City of Chicago, 337 U.S. 1 (1949); and, Cantwell v. Connecticut, 310 U.S. 296 (1940).

[9] Petitioner's administrator testified that absent any extraordinary circumstances the entire permit application process could have been abbreviated [R3--156] to five, ten or fifteen minutes.



but which would appear to be a controlling factor, here, insofar as Respondent seeks to hold a rally on the courthouse green in front of the County Courthouse.

> Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be public forums. In such places, the government's ability to permissibly restrict expressive conduct is very limited....

United States v. Grace, 461 U.S. 171, 177 (1983) (any restriction on expression must be narrowly drawn and accomplish a "compelling interest"). See also, Perry Education Ass'n v. Perry Local Education Ass'n, 460 U.S. 37 (1983).

D. MODERN CONSTITUTIONAL DOCTRINE IMPACTS HEAVILY

The court below, also [P.C. App. 30], points to the "more recent Supreme Court cases" involving traditional public

forums, citing Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir.1985) which points to "modern free speech cases" and "modern constitutional doctrine," 774 F.2d at 1522.[10]

A poll tax dubbed a "ballot box user fee" would scarcely have escaped the same scrutiny in 1966 which Respondent seeks for the free speech user fee in 1992. The

---

10 A sampling of such cases would include: Lubin v. Panish, 415 U.S. 709, 718 (1974) (indigent candidates' access to elective ballot cannot be barred by filing fee); Bullock v. Carter, 405 U.S. 134 (1972) ($150.00 to $1,000.00 election filing fee cannot bar indigent candidate); Bodie v. Connecticut, 401 U.S. 134, 149 (1971) ($60.00 filing fee for indigent seeking divorce is unconstitutional); Little v. Streater, 452 U.S. 1, 16-17 (1981) (indigent paternity defendant to be provided with blood test at government expense) and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax unconstitutional).



right to speak[11] is, certainly, not to be denigrated below the right to vote. More

---

11 Other cases involving First Amendment user fees include: Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir.1983) ($200.00 application fee for marching along abandoned railroad line struck down); Collin v. Smith, 578 F.2d 1197 (7th Cir.1978), cert. den. 439 U.S. 916 (1978) (ordinance invalidated requiring insurance for paraders unable to afford insurance); Hull v. Petrillo, 439 F.2d 1184 (2d Cir.1971) (invalidating $15.00 annual license fee for selling newspapers on the street); International Society for Krishna Consciousness, Inc. v. Griffin, 437 F.Supp. 666 (W.D.Pa.1977) (invalidating fee for permit for distribution of literature); Moffett v. Killian, 360 F.Supp. 228 (D.Conn.1973) (invalidating $35.00 lobbying activity registration fee); and Gall v. Lawler, 322 F.Supp. 1223 (E.D. Wis.1971) (striking down $100.00 per day license fee on distributors of underground newspaper); Jones v. Opelika, 319 U.S. 103 (1943) (prohibiting license or tax to distribute literature); and, United States v. Texas, 252 F.Supp. 234 (W.D.Tex.), aff'd 384 U.S. 155 (1966) (disallowing poll taxes). See also, Follett v. Town of McCormick, 321 U.S. 573 (1944) (striking down $1.00 per day license fees for First Amendment solicitors door-to-door).

people do speak than vote.

E. MURDOCK IS CONTROLLING

For some fifty years, following Murdock v. Pennsylvania, 319 U.S. 105 (1943), the words of Justice Douglas were seemingly so strong and so clear that there was little doubt that free speech user fees could not stand.

The Court of Appeals was "aided substantially" by Murdock, P.C. App. 30, note 6, which held that government "may not impose a charge for the enjoyment of a right granted by the Federal Constitution," Murdock, 319 U.S. at 113.[12]

---

12 Since the ruling below found the ordinance facially unconstitutional, the court did "not need to inquire whether the particular imposition of a fee ... is unconstitutional," P.C. App. p. 31, note 10. Therefore, whether a mere nominal fee may be charged is arguably not before the Court. However, alternatively, insofar as Murdock may have suggested that nominal



It should be said, therefore, that Murdock is settled law, of "long lasting acceptance," usually given great weight in the Supreme Court,[13]

The Murdock Court did not wallow in the quick sands of uncertainty when faced, as here, with a free speech user fee.

It is a license tax ... imposed on

---

fees on free speech may be permissible, should the issue be ripe, here, it should be time to construe any fee as an unconstitutional restraint upon speech, cf. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), Lovell v. City of Griffin, 303 U.S. 444 (1937), Martin v. Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Marsh v. Alabama, 326 U.S. 501 (1946); Flower v. United States, 407 U.S. 197 (1972); Papish v. University of Missouri, 410 U.S. 667 (1973); and, United States v. Grace, 461 U.S. 171 (1983) (for various alternative rationales).

13 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). Stare decisis should also be a factor, see e.g. United States v. Rands, 389 U.S. 121 (1967) (the latter controls the former).

> the exercise of a privilege granted by the Bill of Rights. A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution.

319 U.S. at 113, 63 S.Ct. at 875. No matter how Petitioner characterizes it.

When "the fee is not a nominal one," Murdock, 319 U.S. 105 at 116-117 at 876, the First Amendment condemns it.[14] Or, even more succinctly:

---

[14] A random sampling of parade ordinances around the country suggests that modern-day ordinances generally do not require fees or that they provide waivers for those unable to pay any fees.

> Before any association, company, society, order, exhibition or aggregation of persons shall collect or gather together or parade or march upon the streets or public places of the city, they shall first obtain a permit from the city manager, which permit, when issued, shall be without charge, and shall state the time, manner and conditions of such march, parade or assembly.

City of Dubuque, Iowa, Code of Ordinances, §33-21 (1991) (emphasis added) (no charge).



---

City of Tucson, Arizona, Ordinance No. 4466, §§21-12 to -17 (April 12, 1976) (waiver authorized for any fees based on individual's ability to pay).

United States Capitol Police Board, Traffic and Motor Vehicle Regulations for United States Capitol Grounds, Art. XIX, §158 (1987) (no fees for assembly at the U.S. Capitol).

City of Raleigh, North Carolina, Ordinance, §§ 12-1051 et seq. (1989) (no fees for parade permit).

City of Jackson, Mississippi, Code of Ordinances, Art. V 1/2, § 27-156 et seq. (no fees for parade permit).

San Francisco, Calif., Park Code §§ 7.01, .06(c), .06(d) (1981) (exempting applicant from financial conditions of permit whose activity "is protected by the first amendment" and for whom meeting conditions "would be so financially burdensome that it would preclude applicant from using park property for proposed activity"); Ordinance No. 168-84, §2.71 (April 18, 1984) (authorizing waiver from permit's financial conditions if applicant certifies activity is for "First Amendment expression" and costs are "so financially burdensome that it would constitute an unreasonable prior restraint").

> Freedom of speech, freedom of press, freedom of religion are available ... not merely to those who can pay their own way.

Murdock, 319 U.S. 105, at 111 (emphasis added).[15]

Murdock, relied upon by Respondent and the Court of Appeals, comes after and

---

[15] Respondent began in 1987, organizing pro-majority speeches, forums and debates. Its goal is majority-rule democracy in America. It is supported by donations, has no paid members or officials and has no income which inures to the benefit of its members or officials. Its income was approximately $205.40 per month as of January 19, 1989, all of which was expended generally for postage, printing and communications.

Its income was anticipated to continue at the level of approximately $200.00 per month. Its liabilities consisted in $1,600.00 in loans. Its physical assets at such time consisted of flags, supplies and printed materials of nominal value and $90.59 in cash. See, e.g., Application to Proceed in Forma Pauperis and Affidavit in Support of Motion for Temporary Restraining Order and Complaint; see also, P.C. App. 8. Respondent is, consequently, impecunious.



interprets Cox v. New Hampshire, 312 U.S. 569 (1941).[16] But the law -- and the

---

[16] Cox came before this court in the context of a prosecution for parading without first obtaining a required permit, 312 U.S. at 570-571, 571-572 n. 1. It did not delineate a basis for assessing any authorized fees, given that it was, essentially, a facial challenge to a particular ordinance. In passing, the Court said that "drawing crowds of observers" could cause a permit fee to be "adjusted," 312 U.S. at 576-77.

This rationale, commonly called the "heckler's veto," was abandoned two years later in Murdock (permit fee confined to "nominal" sum) and rejected entirely in later cases.

An example of the "Heckler's Veto" would be that if the potential for opposing crowds was great and that disorder was threatened by crowds, the permit seekers' fees could be increased to the point that those desiring to petition the government could not afford to pay the fees and, therefore, be barred from assembly or speech in public. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (turning aside liability of demonstrators for disruptive acts of others); Coates v. City of Cincinnati, 402 U.S. 611. 615-16 (1971) (state may not bar public gathering "annoying" to others);

Bachellar v. Maryland, 397 U.S. 564, 567 (1970) (protesters cannot be punished because of "resentment" of spectators); Gregory v. City of Chicago, 394 U.S. 111, 117 (1969) (protester cannot be held for disorderly conduct due to surrounding crowd becoming hostile); Brown v. Louisiana, 383 U.S. 131, 133 n. 1 (1966) (plurality opinion) ("participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence"); Cox v. Louisiana, 379 U.S. 536, 550 (1965) (breach of peace conviction reversed where demonstrators accosted by "muttering" onlookers); and, Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (breach of peace convictions reversed where demonstrators at state capitol accosted by crowd threatening disruption of their peaceful demonstration). See also, Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 296 (1981) ("To place a Spartan limit - or indeed any limit - on individuals wishing to band together to advance their views ... while placing none on individuals acting alone, is clearly a restraint on the right of association") (see Petitioner's Ordinance #34, §§1(2), 3(6) P.C. App. 102, 119 limiting $1,000.00 permit fee liability to groups "more than three in number"). See also, In Re Primus, 436 U.S. 412, 426



modern progression of the law -- did not halt in the early 1940's. The channel for expression of ideas was widened and deepened and, even now, requires dredging.[17]

### F. SPEECH AND ASSEMBLY ARE INSEPARABLE

Our national commitment to the First

(1978) (First Amendment protects group activity); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (freedom of association is an inseparable aspect of due process, which includes freedom of speech)

[17] The Court is urged, if it sees fit, to expressly overrule any lingering restraints on free speech attributed to Cox by ruling that any fee, nominal or otherwise, is an unconstitutional prior restraint on speech, akin, perhaps, to its reasoning in poll tax and other voting-related cases, cf. Jones v. Opelika, 319 U.S. 103 (1943), Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) and United States v. Texas, 252 F.Supp. 234 (W.D.Tex.), aff'd. 384 U.S. 155 (1966) (as to poll taxes and other license fees or taxes).

Amendment must remain unshorn.[18]

To turn from this well-worn path on the way to freedom's table land would thrust the feet of self-government out into the desert of oppression, there to wander among the snakes of tyranny and the scorpions of despotism. For indeed, only those who could afford the "toll" could travel democracy's highway; only those

---

18 See, e.g. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citing a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide-open"); Carey v. Brown, 447 U.S. 455, 467 (1980) (expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values"); in accord, Connick v. Myers, 461 U.S. 138 (1983); Terminiello v. Chicago, 337 U.S. 1 (1979) (speech said to serve high purpose by creating dissatisfaction with conditions as they are); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government").



who were "approved" by officialdom could cross the drawbridge.

It does not close the gaping wound of oppression to dab a little ointment on with the words: But you have alternative means of expression.[19] Even if Respondent publishes a paper, distributes flyers or gathers together in a member's home,[20]

---

19 In this case, Respondent was banned from conducting a rally at the local high school or from parading through the city streets [P.C. App. 21] at all. Given the ban, also, at the county courthouse, Respondent was denied access to all traditional public forums in the area.

20 It should be noted at this juncture that Petitioner has refered to materials which were not part of the record, below [Brief for Petitioner, p. 5], in support of its contention that Respondent had "ample alternative channels" for expression: P.C. App. E-G (newspaper clippings), J (purported printed bulletin), K (order from separate court case), L-M (newspaper clippings), P-S (purported minutes of meetings) and U, W (purported printed bulletins), but which are not subject to consideration here. See Corpo-

only assembly of the people at the traditional public forums -- in this instance, the very seat of government, itself -- fully satisfies the guarantees of the

---

ration Com. v. Cary, 296 U.S. 452 (1935), Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941), reh. den. 312 U.S. 715 (1941) (record cannot be added to on appeal).

Also, included at the end of the Joint Appendix is the sentence "All appendix items deemed relevant by the parties are found in the Appendix to the Petition for Certiorari." These words were included by Petitioner without the knowledge or consent, and over the objection of, Respondent. See Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 9, n. 2 (objecting to the said non-record materials). If the Court so desires, Respondent is prepared, nonetheless, to argue upon the extraneous matter.



First Amendment.[21]

G. THERE IS NO CONFLICT WITH OTHER CIRCUITS

In support of its claim that the court below is "out of step" with "other circuit courts of appeal," Petitioner cites South Suburban Housing Center v. Board of Realtors, 935 F.2d 898 (7th Cir.1991), reh. den., 1991 U.S. App.Lexis 20783 (7th Cir. 1991), cert. den. 60 U.S.L.W. 3520 (1992) (realty sale signs) and Kaplan v. County of Los Angeles, 894 F.2d 1076 (9th Cir.), cert. den. ___ U.S. ___, 110 S.Ct. 2590 (1990) (listing in

---

21 Cf. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (freedom of assembly is inseparable from freedom of speech); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98 (1982) (concerted action is as much protected as individual action).

candidates' brochure). However, these cases do not involve the "traditional public forum," as here, and are, therefore, not in point.

Petitioner relies upon Fernandez v. Limmer, 663 F.2d 619 (5th Cir.1981) which actually threw out a $6.00 airport permit fee, holding that the fee was impermissibly conditioned on the applicant's willingness and ability to pay (an appropriate analogy to the instant case). Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir.1976), cert. den. 431 U.S. 913 (1977) actually struck down a $5.00 deposit for posting signs as an unconstitutional tax on exercise of the First Amendment (suggesting that government must find a means



less restrictive of free expression).[22]

Petitioner's attempt to extrapolate Ward v. Rock Against Racism, 491 U.S. 781 (1989) for the purpose of imposing fees upon free speech is misplaced. Ward does not impose fees on free speech; it simply allows the volume of music at a public forum to be modulated.

H. DESPITE CONTENT NEUTRALITY CLAIMS IN ITS BEHALF, THE FREE SPEECH USER FEE IS TOO FRAUGHT WITH POTENTIAL FOR ABUSE TO PASS CONSTITUTIONAL MUSTER

Petitioner insists that its ordi-

---

22 Stonewall Union v. City of Columbus, 931 F.2d 1130 (6th Cir.1991), cert. den. ___ U.S. ___, 112 S.Ct. 275 (1991), also cited by Petitioner, would seem to be of little precedential value. While it did treat license fees in a public forum, in dicta, the case was remanded because the parade applicant was likely denied equal protection in the City's selective waivers of its fees. It will, likely, be reversed on that point.

nance is "content neutral," a claim which echoes the dictum that "rich and poor, alike, are free to sleep under the bridges of the Seine."

To those who might argue that the Stamp Act is, somehow, different than the Forsyth County parade permit fee, Justice Murphy, concurring in Follett v. Town of McCormick, 321 U.S. 573, 579 (1944) (concurring opinion) (striking down a $1.00 per day or $15.00 per year fee), might admonish:

> It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms ... unless it is kept within appropriate bounds.

Despite Petitioner's protestations that the content of Respondent's speech is immaterial [e.g., Brief for Petitioner, p. 37], Petitioner belies an underlying



objection -- even hostility -- to such speech, itself.

> [T]he Nationalist Movement has targeted Forsyth County ... to annually demonstrate its views and opposition to the Martin Luther King, Jr., holiday. Therefore, public policy supports imposition of a $100 fee to ameliorate the substantial costs expended by the County in funding the Nationalist Movement's perennial parade and rally.

[Petitioner's Brief on Appeal to the Appeals Court, p. 10]. So, if, arguendo, supporting the King Holiday is "public policy," then opponents of "public policy" must be assessed the fee, according to Petitioner's logic.

Petitioner states that its motivation to impose a charge stems from a desire to recoup its costs from "funding" Respondent's public assembly, perhaps as a king might tax his subjects for "allowing" them to gather at his pleasure.

Instead, according to Hague v. CIO, 307 U.S. 496, 515 (1939), government holds the public forum "in trust for the use of the public".[23]

In this regard, the "sliding scale" of Petitioner in calculating fees,[24] is particularly susceptible to abuse.

## I. SAFETY AND LIBERTY: RIGHTS, NOT GRANTS

If, indeed, the fee is to "assure the safety" of citizens [Brief for Petitioner, p. 42] through a scheme whereby citizens pay for the use of police power

---

23 See also Grosjean v. American Press Company, 297 U.S. 233 (1936) (any action of government preventing free discussion is an evil to be prevented).

24 Even the trial court expressed its difficulty in understanding the various distinctions attempted to be drawn by Petitioner between "private organizations," "private persons" and others in respect to its fees [R3- -208-209].



in their behalf, is the householder, next, to be presented with a bill for having a burglary at his home investigated? Or, is the fireman to stand idly by and watch a home go up in flames until a fee is paid?

Shall the poor be robbed and left destitute while only the rich are provided with police or fire protection?

Certainly not.

Citizens exercising their First Amendment rights are entitled to police protection, Wolin v. Port of New York Authority, 392 F.2d 83, 94 (2d Cir.1968), no less than a homeowner is entitled to protection of his property.

Just as the poor householder could not be expected to hire his own security guards, although the rich often can do so, here, impecunious speakers should not be

expected to hire their own police.[25]

The proposition of shifting the costs of police protection to those protected, even for "emergencies," has received no widespread support.[26]

---

25 Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523 (11th Cir. 1985) condemned, on equal protection grounds, the effect of permit fees which, as here, disadvantage the poor:

> [I]ndigent persons, who wish to exercise their First Amendment rights of speech and assembly and ... are unable to pay such costs are denied and equal opportunity to be heard.

Central Florida was a basis of the Appeals' Court ruling in the instant case. Cf. Dombrowski v. Pfister, 380 U.S. 479, (1965).

26 One federal court even rejected a novel claim by a municipality to recover costs of emergency fire and evacuation services from a railroad responsible for a derailment, City of Flagstaff v. Atchison, T. & S.F. Ry., 719 F.2d 322, 324 (9th Cir.1983) (not involving First Amendment claims).



What, then, if perchance the Pope wished to come to town, to appear on the courthouse steps, the same place Respondent's seek? Would he be sent a bill for police services? No, because providing services uniformly for all demonstrations would be considered a regular part of police duty.[27]

What if a foreign dignitary showed up? Would he be billed? No, because police expenses have been specifically augmented by the federal government.[28]

What if Petitioner wanted to attract

---

27 Cf. O'Hair v. Andrus, 613 F.2d 931 (D.C.Cir.1979) (injunction seeking payment of police costs by Archdiocese as precondition for appearance by Pope on the National Mall, denied).

28 See, e.g., 3 U.S.C. §208 (Supp.1984); 31 C.F.R. pt. 13 (1984); H.R. Rep. No. 533, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Ad. News 3633.

an event, such as a political convention, and, even, offer police services as an incentive?[29]

How, then, would the "sliding scale" slide?[30]

### J. THE PUBLIC GOOD IS ADVANCED BY INVALIDATION OF THE FREE SPEECH USER FEE

Were Petitioner to prevail, multitudinous litigation would likely result as humbler elements of society, assessed greater and even prohibitory fees, call

---

29 N.Y. Times, Oct. 21, 1983, at A-14, col. 6 ("San Francisco has pledged to spend $1.5 million to provide 1,500 police officers solely assigned to the convention and $1 million more, if needed, to augment those officers with police forces from the city's suburbs").

30 Note that special legislation has been enacted in cases where police services are donated so that such donations are not considered contributions counted against statutory campaign limitations, e.g., 11 C.F.R. §9008.7(b)(2)(iii)(1984).



officials to account for variations in such fees.

Hard-pressed officials could be given to impose fees, across the board, in an attempt to appear "even-handed," perhaps even taxing or surcharging Christmas caroling students as a ploy to excise candle light vigiling Nationalists from the streets... all to the crippling of impecunious, First Amendment paraders.[31]

---

31 Another scheme might be "adjust[ing] the amount to be paid in order to meet the expense incident to the administration," Ordinance #34, Brief for Petitioner, p. xi, to include "execution under oath by each individual in a group applying for the permit of a pauper's affidavit," Ordinance #34, P.C. App. 109, 110.

Each poor member of a group of 2,000 would, incredibly, be required to execute an affidavit of indigency in order to march. A single member who was not impecunious, or a speaker who appeared before the group who was not poor, would be liable for all "administrative costs," including the execution of the affidavits.

[R3- -212-213]

The Court: In other words, if they say they're going to have 200 people there, that means you've got to have 200 affidavits.

Mr. Stubbs: That's correct, your Honor. If they've got 200 people, they're either all not indigent and they can pay a fee or they all are and they're going to have to say so.

...

The Court: All right. Suppose you get 200 indigents who can sign the affidavit and they're the ones who march, but when they get to the courthouse, Mr. Barrett gets up? He didn't march; he met them there. He gets up and makes a speech.

Mr. Stubbs: [T]hen that may be the basis for ... any other possible remedies.

All of the marchers go to jail because a speaker stands up and speaks, who may not be poor.

And what of a marcher who joins in the parade at a late hour, who has not signed an affidavit? If he joins in, is he -- and possibly all the others who



History indicates, however, that freedom-loving people will take to the streets in pursuit of liberty and justice,

allow him in -- to be arrested, as well?

[R3- -171]

Q. If the corporation has 2,000 members, you would require 2,000 affidavits, is that correct?

A. Yes, sir.

How long it would take to execute 2,000 affidavits prior to a parade is not known. It would, assuredly, be a lengthy period of time. Cf. Elrod v. Burns, 427 U.S. 347, 373 (1976) (loss of First Amendment rights for even a minimal period of time constitutes irreparable injury).

Petitioner, also, has no set rules to protect the privacy of the citizen wishing to exercise his First Amendment rights. See, Black Panther Party v. Smith, 661 F.2d 1243 (D.C.Cir.1981); Brown v. Socialist Workers' '74 Campaign Committee, 459 U.S. 91 (1982) (requirement of non-disclosure of names of persons taking part in protected activities).

Petitioner's procedure simply reeks of unbridled discretion in its officials.

be it to overturn the Stamp Act or tear down the Berlin Wall.

Should Respondent prevail, an aura of confidence in the American Way of Life would be restored: to the end that the inalienable right to liberty is advanced by peaceful, orderly democratic means.[32]

Otherwise, vigilantes, like Minute-men, may well proliferate. Streets may be filled with reformers disregarding the law, as they were once filled with Sons of

---

32 See, e.g., The Nationalist Handbook, The Nationalist Movement 95, 97 (Learned, MS 1992):

> Obey and use all valid laws, particularly those concerning permits, sound, assembly, picketing and the like....
>
> ...
>
> Filling up the town square may be more effective than filling up the



Liberty defying the king. Flags bearing a pine tree and "An Appeal To Heaven" may replace petitions here. And a Second American Revolution may well proceed over the outrage of the Forsyth Ordinance, much as the First American Revolution proceeded over the abuses of the Stamp Act.

But let the rainfall be the shower that awakes and refreshes, rather than the deluge that ravages and washes away.

To the end that a permit may, in no wise, be considered a prior restraint on freedom of speech,[33] a license to speak or to parade should have just one purpose:

---

> jails. Consult your legal counsel, follow his advice....

33 See e.g. Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1971) (denial of parade permit invalidated on grounds of being a "prior restraint" on free speech), citing with approval, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 155 (1969) (held, an applicant could

to satisfy the need for notice to public officials as to the time the parade will take place, so the officials can protect the general public, including those taking part in the activity. Jackson v. Dobbs, 329 F.Supp. 287, 292 (D.C.Ga. 1970), aff'd and remanded 442 F.2d 928 (1970).[34]

And so, the unpleasant harbinger of a New York Times Co. v. Sullivan, 376 U.S. 254 (1964) turned topsy turvy is avoided.

Under Sullivan, one is free to speak, unless he forfeits that right by acting out of actual malice. Reverse, here, and the people are no longer free to

---

ignore an unconstitutional denial to parade with impunity).

[34] No permit at all seems preferable to a permit which impermissibly abridges First Amendment rights. Cf. Kunz v. New York, 340 U.S. 290 (1951) (striking down religious assembly permit for giving too much discretion to issuer so as to abridge



speak, unless the abridger of their rights forfeits his ability to enforce his ban by acting out of actual malice. Affirm, and it is the speaker, alone, who may disqualify himself[35] from speaking. Not the

---

First Amendment; no permit fee involved).

[35] Such disqualification might be

> to advocate, advise, teach the duty, necessity, desirability, or propriety of the destruction of life by murder or assassination; the destruction of property by violence or arson; or the disruption of Government, by any of the aforesaid means....

Proposed Internal Security Act of 1968, testimony of Richard Barrett before United States Senate, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, Point 6, p. 601, March 26, 1968, U.S. Government Printing Office. See cf. Richard Barrett, The Flag Defilement Statutes Defiled, 5 Memphis State University Law Review 398-399 (1975) (citing police power, the Necessary and Proper Clause of the Constitution, valid state objectives and promo-

courts. Nor officials. Nor government.

So, the free speech permit is held up to the canvas of public policy. As a permit, alone, its colors seem to unobtrusively blend in with the background. As a license with a nominal fee, its texture is somewhat less harmonious, more distinctly out of place. But as a $1,000.00 fee, it leaves an indelible blot, marring the red thread of liberty, the white yarn of safety and the blue cord of democracy which make up the fabric of a free people.

---

tion of responsibilities of citizenship for limitations upon speech).

The patriotic must be distinguished from the subversive, the moral from the immoral, in issuing permits. Liberty which allows uniformed veterans to march



## III. CONCLUSION

How unthinkable that those surveying the rubble of the Berlin Wall would gaze beyond their Old World -- drenched in the blood of wars, invasions and oppression -- to our New World and, through tear-filled eyes, here, witness the erection of barricades against Americans lawfully and peacefully parading in the streets. And so soon after they have torn down the same barricades of their own.

We cannot slip backwards into darkness and despotism; we must always be the land of hope and light.

It would seem that labeling a skunk a cat would have no effect on the odor.

Likewise, it is too late to label a

---

down the street waving flags does not permit naked homosexuals to march down the street waving condoms.

free speech user tax as a "parade application fee" to camouflage its pernicious attack upon free speech and assembly.

One wonders -- but not for long -- Would a poll tax have survived being labeled a "ballot box user fee"? No similar window dressing can disguise the instant free speech user tax, however, by incessant insistence that it is not a tax.

The case at bar is, in addition, a classic rearguing of the propriety of the "heckler's veto," already ruled upon, in all its many facets, by this Court.

Striking down the free speech user fee does not rob the beleaguered public fisc. For it is one thing to tax the income of a preacher, but quite another to make him pay to deliver a sermon.

When Respondent's rally does proceed and speeches are delivered in public



places without fear or fees, Petitioner's complaints against the "unimportant" speech it hears may well be recorded along with those who placed a similar onus upon the words of a lanky orator at Gettysburg.

The oppression and injustice of a $1,000.00 free speech user fee is neither contemplated under the inalienable Rights of Man, the First Amendment nor a time-honored tradition here, for which reason -- together with those reasons hereinbefore set forth -- Respondent requests that the Appeals' Court be affirmed.

THIS the 27th Day of February, 1992.

Respectfully submitted,

RICHARD BARRETT
Attorney for Respondent
PO Box 2050
Learned MS 39154
(601) 885-2288

## CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, three true copies of the foregoing Brief of Respondent to Robert Stubbs III, Esq., Attorney for Petitioner, at 110 Old Buford Rd., #200, Cumming, Georgia 30130.

THIS the 27th Day of February, 1992.

_____

RICHARD BARRETT

No. 91-538

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

FORSYTH COUNTY, GEORGIA,

*Petitioner,*

v.

THE NATIONALIST MOVEMENT,

*Respondent.*

---

## REPLY BRIEF FOR PETITIONER

---

KING & SPALDING
GORDON A. SMITH
DAN H. WILLOUGHBY, JR.

191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

McVAY & STUBBS
ROBERT S. STUBBS III*
J. RICHARD NEVILLE
**Counsel of Record*
Forsyth Prof. Bldg.
Suite 200
110 Old Buford Rd.
Cumming, GA 30130
(404) 889-6045

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases







Statutes

## STATEMENT OF THE CASE

Petitioner adopts in full its Statement of the Case set forth in its Brief @ 1-15.

## ARGUMENT

### I. ORDINANCE 34 DOES NOT IMPOSE A PRIOR RESTRAINT ON THE EXERCISE OF PROTECTED EXPRESSION NOR DOES IT INCORPORATE A DE FACTO HECKLER'S VETO

The overriding theme found in the positions of the Movement and its Amici Curiae is that Ordinance 34's sliding scale of fees for "the maintenance of public order" incorporates a de facto heckler's veto so as to increase the fee to be paid by one with a controversial message. Recognizing that their complaints may only be addressed if this Court acknowledges the Movement's standing to attack the Ordinance on its face, this Court should reject such meritless concerns because of Ordinance 34's cap on license fees, which provides ample protection against excessive costs and because of the availability of indigency provisions for those who qualify for indigency treatment. Moreover, the record before this Court demonstrates that the County only assessed a $100 fee, one tenth of the maximum fee, for the proposed rally by the Movement.

A brief analysis of the primary authority cited by the Movement and its supporters reveals that those cases review statutes and ordinances which are patently content or speech specific and which, for the most part,

criminalize certain speech or conduct based on its effect on others. For example, Coates v. City of Cincinnati, 402 U.S. 611 (1971), struck down an ordinance prohibiting three or more persons from engaging in annoying conduct on public streets because its standards for determining what is "annoying" were nonexistent and because it violated the right to free assembly and association. "Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of...constitutional freedoms." Id. @ 615. The record clearly reflects that such "public intolerance or animosity" was not the basis for Ordinance 34. County Brief @ 6-7.

Similarly, Gooding v. Wilson, 405 U.S. 518 (1972), struck down Georgia's abusive language statute as overbroad because it was not limited by Georgia case law to "fighting words." Brandenburg v. Ohio, 395 U.S. 444 (1969), struck down Ohio's criminal syndicate act which imposed criminal penalties for "mere advocacy" of violence without distinguishing between such advocacy and preparation for violent acts. Cantwell v. Connecticut, 310 U.S. 296 (1940), invalidated a statute which penalized religious evangelism to one not of the same religion or sect. The Court found no breach of the peace even though the message may have angered listeners which, unlike the statute being reviewed, were content neutral. Finally, in Terminiello v. City of Chicago, 337 U.S. 1 (1949), arguably the seminal heckler's veto case, the Court reversed a conviction of a



speaker whose speech was found to have "stirred people to anger, invited public dispute, or brought about a condition of unrest." Id. @ 4.

All of the foregoing cases are directly content based attacks on free expression which criminalized specific speech or conduct based on a rationale of protecting listeners from unpleasant views. Such cases simply provide no basis for invalidating the fee provision of Ordinance 34.

The Movement and some of its Amici have cited NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), as support for their position against any monetary payment by demonstrators who may economically harm others as a result of their message, whether intentional or otherwise. There the Court set aside a damage award against the NAACP as a result of losses to businesses subjected to a boycott. Nonetheless, the Court recognized a "strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." Id. @ 912. The Court also noted that

> we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment

freedoms is no greater than is essential to the furtherance of that interest.

458 U.S. @ 912, fn 47, citing U.S. v. O'Brien, 391 U.S. 367, 376-377 (1968).

Amicus ACLU likens the fee provision to the insurance provision struck down in Collin v. Smith, 578 F.2d 1197, 1208-1209 (1978), cert. denied, 439 U.S. 916 (1978), as indicative of other lower courts' rejection of advance fee provisions in free expression cases. It should be noted at the outset that this Court has never cited Collin with approval. While Collin represents the only decision by a federal appellate court outside the Eleventh Circuit which even arguably impacts on the fee provision of Ordinance 34, even Collin distinguished the insurance provision from a fee scheme like that approved in Cox v. New Hampshire, 312 U.S. 569 (1941). Furthermore the Village of Skokie conceded that the insurance provision could not be applied to the Nazis in that instance and the decision regarding the insurance provision was limited to an as applied holding. In any event, the Dissent forcefully argues that the Cox rationale should have upheld the insurance provision. 578 F.2d @ 1214. In the final analysis, an unattainable insurance policy differs from the County's fee provision of Ordinance 34 because apparently there as no indigency provision if a policy could not be obtained, whereas the fee provisions of Ordinance 34 may be waived for indigent individuals.



## II. REVIEW OF THE COUNTY'S INDIGENCY PROVISION IS NOT PROPERLY BEFORE THE COURT.

The Movement and its Amici have suggested to this Court that the fee provision of Ordinance 34, however small, may shut out indigents. They attempt to inject an issue which was specifically not ruled on by the lower court and which is not properly before this Court. P.C. App. @ 31, fn. 8.

However, the existence of the indigency provision in Ordinance 34, section 3(7), P.C. App. @ 119-120, distinguishes this case from any of the cases which are advanced by the Movement as modern free speech cases which should cause this Court to reject is holding in Cox. Those cases, Little v. Streater, 452 U.S. 1 (1981), Lubin v. Panish, 415 U.S. 709 (1974), Bulloch v. Carter, 405 U.S. 134 (1972), Boddie v. Connecticut, 401 U.S. 371 (1971), and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), all illustrated how rights of indigents could be abridged by unavailability of funds, a problem not faced by indigent individuals applying for a permit to demonstrate in Forsyth County, Georgia.

The Movement is not an individual, however, but a corporation not entitled to indigency treatment under Ordinance 34, nor under the filing provisions of the federal courts. Title 28 U.S.C. § 1915; Nationalist Movement v. City of Cumming et al, Case No. 89-8417 (11th Cir., Sept. 8, 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 767 (1991); FDM Manufacturing Co. v. Scottsdale

Insurance Co., 855 F.2d 213 (5th Cir. 1988).

## III. THE MOTIVATION FOR ENACTMENT OF ORDINANCE 34 WAS PURE, HAVING NOTHING TO DO WITH CONTENT OF EXPRESSION.

The Movement has directly attacked the County's motivation based on argument of counsel in the Court below. It is elementary that argument of counsel is not evidence, but only an attempt at persuasion and justification for a position. Argument of counsel does not supplant the unrebutted evidence of the County's purposes for enactment of Ordinance 34, which had nothing to do with the content of expression. See County Brief @ 6-7.

Allusions to the Stamp Act as support for the Movement's positions are also unavailing. A useful discussion of the Stamp Act and its use in free expression jurisprudence is found in Grosjean v. America Press Co., 297 U.S. 233 (1936), where this Court invalidated a tax on newspaper publishers having a certain circulation because motivation for the tax was similar to the Stamp Act where "revenue was of subordinate concern; and...the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs." Id. @ 247. There is no evidence whatsoever that such a motivation underlies Ordinance 34.



## IV. ORDINANCE 34 DOES NOT IMPERMISSIBLY DISCRIMINATE AGAINST GROUP EXPRESSION.

The Movement alleges that Ordinance 34 infringes upon freedom of association by differentiating between groups of individuals more than three in number and groups of individuals less than four in number. Movement Brief @ 30-31, fn. 16. Thus the argument apparently condemns charging a permit fee for four persons to demonstrate, but not for one, two or three persons, because three or less persons are not required to obtain a permit or pay a fee.

The County is entitled to make a general legislative determination as to when expressive activity impacts the County fisc by causing administrative effort and public safety costs. The County's determination was that three or fewer individuals cause no administrative effort and probably do not impact public safety concerns at all; thus there is generally no need for governmental involvement. At some level that changes; the County has made that break at four individuals. Any fee would, at such a low level, be nominal, growing as administrative effort and public safety concerns escalate.

The Movement cites Chief Justice Burger's quotation from Citizens Against Rent Control, etc. v. City of Berkeley, 454 U.S. 290, 296 (1981), out of context. In that case Justice Burger states that "any limit - on individuals wishing to band together to advance their views...while placing none on individuals acting alone, is

clearly a restraint on the right of association." Ordinance 34 places no requirement for a permit on two or three persons, only on more than three persons. Thus, associational rights are not the basis for Ordinance 34's distinction between less than three persons and more than three persons. Instead, Ordinance 34's distinction is based upon a determination as to the point where there is impact on county responsibility for action to regulate and protect demonstrators. More importantly, the requirement to obtain a permit or pay a fee does not "hobble" associational rights as was found in Citizens Against Rent Control, where contributions exceeding $250.00 from any single contributor, including associational groups such as corporations and associations, were prohibited.

Also cited by the Movement is In Re Primus, 436 U.S. 412 (1978), where disciplinary action against solicitation by an attorney for a non-profit legal service organization was invalidated. The Court expressly permitted states to fashion reasonable restrictions with respect to time, place and manner of solicitation by members of the Bar. Id. @ 438.

Thus, the Movement's attempt to drag associational discrimination into this case is unavailing and seeks to distract the Court from the true issue before it: The continued vitality of the principles expressed in Cox v. New Hampshire, 312 U.S. 569 (1941).



V. THE CONTINUED VITALITY OF MURDOCK V. PENNSYLVANIA, 319 U.S. 105 (1943), IS QUESTIONABLE AND SHOULD FORECLOSE ANY ARGUMENT THAT ITS HOLDING LIMITS COX V. NEW HAMPSHIRE, 312 U.S. 569 (1941).

The County has previously distinguished this Court's holding in Murdock from that of Cox. County Brief @ 32-34. This Court has recently expressly "limit[ed] Murdock...to apply only where a flat license tax operates as a prior restraint on the free exercise of religious belief." Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S.Ct. 688, 695 (1990) (emphasis added). Amicus ACLU apparently fails to note the fundamental distinction between a tax and a regulatory fee noted by Justice Douglas in Murdock when it cites Jimmy Swaggart Ministries as support for the Movement's position. ACLU Brief @ 16.

VI. ORDINANCE 34'S FEE IS A USER FEE, NOT AN ATTEMPT TO COLLECT COST OF SERVICES FROM A TORTFEASOR.

The Movement and certain of its Amici liken the County's fee to an attempt to collect costs of services from tortfeasors whose actions necessitate public expenditures. District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984); City of Flagstaff v. A.T. & Santa Fe Ry Co., 719 F.2d 322 (9th Cir. 1983); see also, O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

These federal appellate decisions provide no support for invalidating Ordinance 34.

In Air Florida, the court recognized government's right to recover expenses to protect its property. That right should allow government to maintain fiscal responsibility in order to carry out its public protection duties. Conscious failure or fiscal inability to protect demonstrators may expose government property (i.e. public funds) to seizure following suits by those injured when inadequate protection is afforded demonstrators. In City of Flagstaff, the court noted that Arizona tort law did not foreclose government's right to recover costs of its services where such recovery was authorized by statute or regulation. Id. @ 324. Reliance by the Movement on O'Hair is also misplaced. That case dealt with whether allowing the Pope to perform a Mass on the Mall which government partially funded violated the Established Clause of the First Amendment. The Court found it did not while noting the Catholic Church's expenditure of $400,000.00 in assisting the Department of Interior with preparation costs. Id. @ 933, 936.

The Movement's attempt to insert tort theory into this constitutional issue is without merit and should be rejected.

## CONCLUSION

For the reasons stated herein and in Petitioner's Brief, Forsyth County respectfully requests that this Court reverse the decision of the Eleventh Circuit holding Ordinance 34 unconstitutional on its face, hold



that Ordinance 34 is constitutional as applied to the Movement, and remand this case to the Eleventh Circuit Court of Appeals with directions to affirm the opinion handed down by the United States District Court for the Northern District of Georgia.

Respectfully submitted this 24th day of March, 1992.

KING & SPALDING
Gordon A. Smith
Dan H. Willoughby, Jr.

191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

McVAY & STUBBS
Robert S. Stubbs III
J. Richard Neville
Counsel of Record
Forsyth Prof. Bldg.
Suite 200
110 Old Buford Rd.
Cumming, GA 30130
(404) 889-6045

No. 91-538

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

---

FORSYTH COUNTY, GEORGIA,
*Petitioner,*

v.

THE NATIONALIST MOVEMENT,
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

---

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*CASES* Page





## TABLE OF AUTHORITIES—Continued

Page



*MISCELLANEOUS*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

No. 91-538

---

FORSYTH COUNTY, GEORGIA,
*Petitioner,*

v.

THE NATIONALIST MOVEMENT,
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

---

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, is filed with the consent of the parties and in support of the respondent, as provided for in the Rules of this Court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Last week, President Bush visited San Francisco for two hours in order to attend a re-election fund-raising event at the St. Francis Hotel. A few days afterward, a member of the San Francisco Board of Supervisors who is also president of the local Central Democratic Committee "ask[ed] the Board . . . to draft a letter requesting a check from President Bush and the Republican Party in the amount of $20,000—what it cost The City in police overtime during Bush's two-hour visit." "Migden: No free lunch for Bush—Who will pay S.F. cops' overtime?" *San Francisco Examiner*, February 29, 1992, p. A1, col. 1; *see also* "SF Billing Bush $20,000 for Police Overtime", *San Francisco Chronicle*, March 3, 1992, p. A13. The response of the vice chairman of the San Francisco Republican Committee was that "'If [the Board] wants to present the federal government with a bill for $20,000, then we'd like to do the same for several nonprofits who have taken up police time with protests.'" *Id.*[1]

As the San Francisco Supervisor quoted above recognized, *any* activity of public interest—including speeches and other political events—that takes place on private property generates crowds and traffic problems on the adjacent public streets and public gathering places. The costs of controlling those crowds and that traffic, providing necessary security and attending to the other consequences of such events are treated as ordinary governmental costs, payable by the local taxpayers as a whole.

[1] It bears noting that in fact, the request was not that the federal government bear the cost, but that President Bush or his political party bear it, because the visit was not governmental but a private, campaign event. *See id.* ("This is different than a state visit, [the Supervisor] continued . . . . [T]his was a fundraising trip and the people of San Francisco should not be expected to pay for his expenses.") Yet, President Bush's campaign speech, and appeal for funds as part of that speech, were indubitably protected First Amendment activity. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).



*See id.* ("'We are obligated to provide security when Bush visits, so this is a request, not a demand.'")

Cities do not ordinarily charge commuters for rush hour traffic control or downtown merchants for the additional police necessary to maintain order during the pre-Christmas shopping rush, or football teams or opera companies for the added load on public facilities caused by their games and performances. Nor, so far as we are aware, are there any reported cases concerning situations in which localities have attempted to condition events, including First Amendment protected activity, on *private* property upon payment of licensing fees designed to defer the cost of such traditional governmental activities as street cleaning, traffic control, and police security. The ordinance here in question, for example, applies only when the communicative activity itself takes place on public property. Pet. App. 103, 112, 117.

At the same time, the primary rationale offered by Forsyth County in this case for its "user fee" ordinance is identical to the one cited by both the San Francisco Supervisor and the Republican Party official quoted above. *See* Brief for Petitioner at 26 ("those wishing to express themselves have a responsibility to share the expense, within reasonable limits, as long as that fee is directly related to the costs which they cause government to incur.")

The San Francisco dispute, then, demonstrates that the governmental interests that purportedly justify shifting the cost of traditional governmental services for expenses due to activity protected by the First Amendment are *not* conceptually limited to the situation, presented here, in which the First Amendment activity takes place upon public property. We therefore begin analysis of the applicable constitutional principles without regard to the public property aspects of this case. After that, we consider whether there is anything in the fact that the speeches and rally in this case took place on the court-

house steps that justifies a greater permission to charge the speakers for "maintenance of the public order in the matter licensed" than would otherwise obtain. Stated in greater detail, we proceed as follows:

1. Recent cases of this Court establish four interrelated principles governing the authority of government to require the payment of fees in connection with the exercise of First Amendment rights. First, financial burdens upon speakers based upon the content of their speech are impermissible, whether or not the government's motive is to suppress the speech. Second, a discriminatory tax on communicative activity particularly, or on some communications but not others of the same type, impermissibly burdens First Amendment rights. Third, any charge of a flat license fee as a precondition to conducting First Amendment activity is an invalid prior restraint upon speech. Finally, government *may* impose generally applicable, after-the-fact, nondiscriminatory taxes upon sales made or income received in connection with First Amendment activity. Pp. 6-10 *infra*.

2. Petitioner maintains that a license fee covering the governmental costs directly generated by communicative activity is similar to a generally applicable sales or income tax on First Amendment-related activity, and therefore valid. Such user fees, however, are, in fact, similar to the kinds of fees this Court has invalidated as impermissible in the First Amendment context.

For example, the financial burden on speakers of license fees based upon governmental costs is likely to vary with the content of the speech, since the "maintenance of public order" will be more costly when the speaker is controversial. Charging speakers for the costs of maintaining public order when they speak also has vices similar to those inherent in discriminatory taxation of communication, because traffic control and security costs on public property are ordinarily absorbed by the taxpayers generally, not by the individuals whose activities



generate the expenditures. And requiring the payment of a user fee as a precondition to the exercise of First Amendment rights also entails dangers similar to those created by flat license taxes. Both operate as a prior restraint and, because not paid through income generated by the communicative activity itself, neither bears any relationship to the economic benefits of engaging in the activity. For all these reasons, user fees based upon the cost of assuring public safety tend to restrict the breadth of discussion on public issues and are inconsistent with the goals of the First Amendment. Pp. 10-15 *infra*.

3. This conclusion does not vary where, as here, the communicative activity itself takes place on public property. Areas such as those covered by the Forsyth ordinance are traditional public fora, in which the government's authority to restrict expressive conduct is at its most limited. In such areas, this Court's cases establish that communicative uses are constitutionally *at least coequal* with other uses, and are not simply tolerated as a matter of governmental grace. Consequently, restraints upon speech in public fora, such as placing economic burdens on the right to speak, are subject to the same strict standards applicable to censorship of speech generally. Pp. 15-19 *infra*.

4. In arguing to the contrary, petitioner relies almost exclusively on *Cox v. New Hampshire*, 312 U.S. 569 (1941). *Cox*, in a single paragraph, upheld a licensing fee, for parades and processions *only*, of up to $300 a day, based upon the cost of administering the licensing scheme and of "maintenance of public order" in each particular instance. *Cox*, however, was decided before the formulation of any of the general principles concerning government imposition of economic burdens upon speech outlined above, before this Court's public forum doctrine developed in its present form, and before the cases proscribing restriction of speech on the basis of the hostile reaction of the listeners were decided. All these develop-

ments point to the conclusion that the user fee holding of *Cox* is out of step with contemporary First Amendment jurisprudence and is therefore no longer good law.

Alternatively, the license fee aspect of *Cox* should be read narrowly, in light of the actual facts of *Cox* and the interpretation of that opinion two years later in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 113-14 (1943). Under this approach, imposition of cost-related license fees for First Amendment activities would be permissible only if the ordinance as drafted or interpreted (a) makes clear that the fee can be charged solely for speech activity that entails *exclusive* use of a location, and then only with respect to the costs incurred in excluding other, competing uses; and (b) imposes a fee "nominal" either in the absolute sense of that word or in the sense that it is a minor percentage of both the applicant's resources and the government's actual expenditures. Because the Forsyth County ordinance violates both these requirements, it is substantially overbroad and therefore invalid. Pp. 19-25 *infra*.

## ARGUMENT

1. This is the first time in the fifty years since the decision in *Cox v. New Hampshire*, 312 U.S. 569 (1941),[2] that this Court has been asked to focus directly upon the precise question of whether, and, if so under what circumstances, persons engaged in communicative activity, protected by the First Amendment, must bear such direct costs to the locality as police protection, cleanup, and traffic diversion as a precondition to permission to engage in the activity.[3] The larger question posed by the required

[2] As we explain below, *Cox* does not directly control this case, because of differences of substance between the First Amendment activity involved in that case and in this one, and because developments in First Amendment jurisprudence subsequent to *Cox* raise considerations the *Cox* Court had no basis to address, and therefore did not consider. *See* pp. 19-25, *infra*.

[3] We do not understand there to be any dispute in this case concerning whether or not the speeches and rally respondents



payment of fees of one kind or another as a condition of the exercise of First Amendment rights is, however, one this Court has often addressed during this period. That jurisprudence thus provides an appropriate starting place for considering the particular problem posed here.

Four distinct but interrelated general principles emerge from the recent cases that bear upon conditioning the exercise of free speech rights upon the payment of fees to the government:

*First*, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster v. New York Crime Victims Bd.*, —— U.S. ——, 112 S. Ct. 501 (1992); *see also Leathers v. Medlock*, —— U.S. ——, 111 S. Ct. 1438, 1444 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). As this Court has explained, the basis for that notion is "a far broader principle" (*Simon & Schuster*, 112 S. Ct. at 508):

> "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) . . . . [T]he Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively dry up certain ideas or viewpoints from the marketplace . . . As we reiterated in *Leathers*, "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, put-

wished to hold on the Forsyth County courthouse steps are fully protected First Amendment activities. Indeed, whatever one thinks of the message respondents wished to convey, the projected demonstration is one at the center of the First Amendment's protections, involving an attempt to protest a governmental enactment through, for aught that appears, peaceful speeches and a rally, in front of a government building. 913 F.2d 885, 887. *See United States v. Grace*, 461 U.S. 171, 179 (1983); Pet. Br. at 23.

> ting the decision as to what views shall be voiced largely into the hands of each of us." [*Simon & Schuster*, 112 S. Ct. at 508.]

It bears emphasis that to fulfill its speech-enhancing purpose, the proscription upon content-based financial regulation focuses on the content-discriminatory *effect* of the regulation, not on the governmental motive underlying the regulation. *Id.* at 509 (it is "incorrect" that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas"); *see also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

*Second*, this Court's "cases clearly establish that a discriminatory tax on the [communicative activity at issue], burdens rights protected by the First Amendment." *Arkansas Writers' Project*, 481 U.S. at 227. A tax that *either* singles out speech-related activity for special treatment *or* "targets a small group of speakers" is discriminatory in this sense. *Leathers*, 111 S. Ct. at 1444-45; *see also Minneapolis Star*, 460 U.S. at 585, 592-93; *Arkansas Writers Project*, 481 U.S. at 229. These prohibitions upon "differential taxation of First Amendment speakers" (*Leathers*, 111 S. Ct. at 1443) are largely prophylactic: Even when the tax is not facially content-discriminatory and no illicit intent can be shown, "a tax limited to [First Amendment-protected activity] raises concerns about censorship of critical information and opinion", as does a tax upon some but not all speakers. *Leathers*, 111 S. Ct. at 1444; *see also Minneapolis Star*, 460 U.S. at 575, 585.

*Third*, any flat fee charged, whether discriminatory or not, as a condition of obtaining a permit for conducting First Amendment activity, "unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme" constitutes an unconstitutional tax on free expression, and an invalid prior restraint



upon speech. *Minneapolis Star*, 460 U.S. at 586 n. 9 & cases cited; *Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378, 385-90 (1990). As this Court has explained,

> Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way. . . . A state may not impose a charge for the enjoyment of a right granted by the federal constitution . . . The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court repeatedly has struck down . . . . On their face [such taxes] are a restriction of the free exercise of those freedoms which are protected by the First Amendment. [*Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 113-14 (1943).]

*See also Follett v. Town of McCormick*, 321 U.S. 573, 577-78 (1944).

*Finally*, all of these strands of authority limiting governmental power to impose financial burdens upon the exercise of First Amendment freedoms recognize that there are circumstances in which individuals and organizations are *not* exempt from governmentally-imposed economic burdens in some way connected to the exercise of First Amendment rights. Rather, generally applicable, after-the-fact, nondiscriminatory taxes upon sales or income ordinarily *can* be applied to the proceeds of First Amendment activity. *Murdock*, 319 U.S. at 112; *Follett*, 321 U.S. at 577-78; *Minneapolis Star*, 460 U.S. at 586 n.9; *Arkansas Writers' Project*, 481 U.S. at 229; *Swaggart Ministries*, 493 U.S. at 389.

Such taxes, the Court has emphasized, are unlikely to "threaten[] to suppress the expression of particular ideas or viewpoints" (*Leathers v. Medlock*, 111 S.Ct. at 1443) overtly *or* covertly, since "a government will [not] destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency," (*Minneapolis Star*, 460 U.S. at 585; *see*

*also Arkansas Writers' Project*, 481 U.S. at 228). And sales, use, or income taxes "do not act as prior restraints —no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message." *Swaggart Ministries*, 493 U.S. at 390. Moreover, since such taxes are due only if, and to the extent that, direct economic benefits are derived from the exercise of First Amendment rights, and are related to the amount of that benefit, it is unlikely that the resulting financial obligation will inhibit the prospective speaker from exercising his free speech rights. *Id.* at 389; *see also id.* at 391 (indicating that there could be constitutional problems with generally applicable tax rate high enough to "effectively choke off" the exercise of First Amendment rights).

2. Petitioner's contention is, in essence, that while a flat fee or tax as a precondition to obtaining a license to engage in First Amendment-protected activity is invalid as a prior restraint upon speech, a fee related to the governmental costs directly attributable to a demonstration is similar to a generally applicable, after-the-fact, nondiscriminatory sales or income tax and is, on that basis, valid. Petitioner's *amici curiae*, and some courts, take the position that as long as the nexus between the advance fee charged and the costs actually incurred by the locality can be substantiated and the guidelines for imposition of the tax are sufficiently clear, there is no limit at all to the amount of a "user fee" that may constitutionally be charged as a condition of carrying out activity protected by the First Amendment. *See, e.g.*, Brief of the City of Orlando as Amicus Curiae Supporting Petitioner ("Orlando Br.") at 8-9; *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991).

The proffered analogy between a "user fee" ordinance of the kind in this case and a nondiscriminatory sales or income tax upon the economic proceeds of speech-related activity simply does not hold. On analysis, such a permit



fee is analogous to the types of fees that this Court has ruled are constitutionally *invalid*.

(a) First, a permit fee measured by "the expense incident to the administration of the Ordinance and to the maintenance of public order" (Pet. App. at 119) can well "impose[] a financial burden on speakers because of the content of their speech." *Simon & Schuster*, 112 S.Ct. at 501.

As the facts of this, and other of the reported, cases indicate, the costs of "maintenance of public order" can easily turn upon the views of the speaker:

> Although the presence of out-of-town demonstrators and the potential for hostile counter activity are proper factors to be considered in determining what level of police protection is needed for a public demonstration, . . . such factors cannot be considered in fixing the cost of protection to those asking to exercise their First Amendment rights. Otherwise, the result would operate to charge more for speech which is unpopular or controversial, in the mind of a public official. This does not comport with the First Amendment principle of equality of expression under the Constitution. [*Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1525 (11th Cir. 1985).]

*See also, e.g.*, Pet. Br. 3, 6 (civil rights marches in Forsyth County met by hundreds of violent counter-demonstrators, costing the government several hundred thousand dollars to control); *Gregory v. City of Chicago*, 394 U.S. 111, 117 (1969) (hostile reaction to civil rights march); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (same).[4]

---

[4] These "heckler's veto" costs can be incurred even where the speech activity itself takes place on private property. Speeches by controversial figures at conventions or other private events often

A government-imposed fee as a precondition to speaking that increases as the content of the proposed speech becomes more controversial thus contravenes the basic principle underlying the proscription on content-based economic burdens on speech: "to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Simon & Schuster*, 112 S. Ct. at 508. Such fees thus "lead to a standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello*, 337 U.S. at 4-5.[5]

---

provoke demonstrations around the building where the event is taking place.

For example, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), an individual was convicted of disorderly conduct because of a speech delivered inside an auditorium:

> The meeting commanded considerable public attention. The auditorium was filled to capacity with over eight thousand persons present. . . . Outside of the auditorium a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order; but they were not able to prevent several disturbances. The crowd outside was angry and turbulent. [*Id.* at 3.]

Similarly, at least part of the cost incurred by San Francisco for the President's two hour visit involved controlling demonstrators protesting the President's policies. "Bush Warns About Demo Defense Cuts: 15 Arrested as President Visits SF," *San Francisco Chronicle*, February 26, 1992, at A1.

Conversely, unusually popular views can also lead to increased need for security and traffic control, because of the sheer size of the crowd attracted. Again, these expenses can be incurred whether the event itself takes place on private or public property.

[5] The Forsyth County ordinance does not simply fail to exclude control of hostile onlookers from the "maintenance of public order" expenses charged to speakers and demonstrators, but explicitly contemplates that such costs *can* be charged. Pet. App. 100 ("the cost of necessary and reasonable protection of persons . . . observing said activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible.")



(b) Charging speakers for the costs of maintaining order while they speak is also similar to imposing a differential tax upon First Amendment-protected activity. Normally, no fees are charged for using public streets, parks and squares, and the costs of providing police protection, sanitation, and traffic control are spread over the populace at large through general taxation.[6] Neither merchants nor customers directly bear the cost of putting traffic police on downtown streetcorners, or of cleaning the litter from the streets after a day in which crowds throng to downtown stores. Imposing such costs on President Bush, for example, because his speech activities occasioned unusual traffic problems would be tantamount to a differential fee structure for protected activity alone, unconstitutional under the rule of *Minneapolis Star*, *supra*. Thus, any user fee statute that singles out speech activity for charges is presumptively invalid as equivalent to discriminatory taxation of communication.

Moreover, even those "user fee" ordinances that do not facially single out First Amendment protected activity specifically, but instead apply generally to organized groups seeking to use public locations for events, may still run afoul of the concerns underlying *Minneapolis Star* and related cases.

In the first place, in some instances it will be quite plain, as it is in this case, that the ordinance setting per-

---

[6] *See City of Flagstaff v. Atchison, Topeka & Santa Fe*, 719 F.2d 322, 323 (9th Cir. 1983) (common law rule is that cost of police, fire and other emergency service is borne by the public as a whole); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984)

Where entry fees *are* charged for use of public facilities—as for some bridges, toll roads, certain public parks and monuments, and public arenas—there *is* a useful analogy to generally applicable, nondiscriminatory taxation. We would suppose that individuals engaging in First Amendment activity would *not* be exempt from paying such generally applicable user fees for use of such public places.

mit fees was occasioned by concern over political demonstrations and was intended primarily to apply to such demonstrations. Pet. Br. at 2-3, 6 (ordinance passed after two civil rights demonstrations in 1987, "[a]s a direct result of the cost incurred in [t]hose two demonstrations.") A fee ordinance actually motivated by a desire to affect protected activity is plainly discriminatory and invalid. *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Secondly, even a "user fee" ordinance that is facially neutral may well be discriminatory in effect as applied to communicative activity. Typically such ordinances allocate the *entire* cost of keeping the peace and maintaining sanitary conditions to the speaker. Yet, onlookers, passersby, and users of the same area are also protected from disorder and litter through the very same expenditures. Charging user fees to some but not all of the beneficiaries of the very same public expenditures, when the feepayers are those engaging in protected activity, economically *overcharges* speakers, and is in that sense discriminatory. Just as *Minneapolis Star* states a prophylactic rule against differential taxation to assure against subtle restriction of speech, a similar prophylactic approach should bar such overcharges as applied to First Amendment activities, permitting user fees only if *all* persons using a particular location are required to pay the fee.

(c) User fees imposed as a precondition to engaging in First Amendment activities also share many of the characteristics of flat license taxes imposed as a precondition to engaging in expressive activity.

Clearly, the *effect* of the user fee in this case is identical to that of the license fees in *Murdock* and *Follett*: In both those cases and in this one, the communicative activity could not (and, in the circumstances giving rise to this case, in fact did not) go forward unless and until the fee is paid. The user fee requirement therefore operates as a prior restraint upon speech for those individuals and groups, like respondent here, who cannot afford the fee.[7]



Moreover, the amount of a user fee—unlike a sales, use, or income tax—is not related to any *economic* benefit an individual or group derives from communicative activity.[8] Thus, there is no reason to expect that the activity itself will generate the funds from which to pay the exacted fees, thereby avoiding any inhibition on speech. Indeed, since the amount of a user fee is potentially open-ended (unless, as in this case, a cap on the fee is included in the regulatory scheme), the potential for censorial impact upon a broad range of potential speakers, including even relatively affluent ones, is much greater than that of the typical flat license fee. *See* Pet. Br. at 6 (police costs for one civil rights march in Forsyth County were $700,000).

3. The question then becomes whether the conclusion that user fees on First Amendment activity are invalid obtains where the user fee permit requirement applies only to communicative activity that takes place on public property.

The ordinance here at issue requires a permit, and a permit fee of up to $1,000 per day, whenever more than

---

[7] Again, in this case the analogy is particularly clear: The permit required in this case is *in terms* "for the *privilege* of engaging in such activity [a parade, assembly, demonstration, road closing, or other activity]". Pet. App. 103. The core of *Murdock, however*, as this Court's recent cases emphasize, is that "a person cannot be compelled 'to purchase, through a license fee or a license tax, a privilege freely granted by the constitution." 319 U.S. at 114; *see also Swaggart Ministries*, 493 U.S. at 386.

[8] A "use tax" is not simply another term for a "user fee". Rather, while a user fee attempts to charge the user of a service for some approximation of the expenses of delivering that service, a use tax is a general revenue-raising device that serves as an alternative to a sales tax and is thus calibrated to the value of some property that an individual uses.

three people hold a "parade, assembly, demonstration, road closing, or other activity" on "public property *or* public roads." Pet. App. at 103 (emphasis supplied).[9]

We take it to be common ground that the locations covered by the ordinance generally, and the location of the demonstration planned in this case in particular—the open grounds of the County Courthouse—are indubitably "among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without any further inquiry, to be public forum property." *United States v. Grace*, 461 U.S. 171, 179 (1983); *see* Pet. Br. at 28.

As a general matter, "in such places, the government's ability to permissibly restrict expressive conduct is very limited." *Id.* at 177. Specifically, time, place and manner regulations are permitted where the regulations are "content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).[10]

---

[9] This case as it comes to this Court does *not* involve a permit to parade on public streets, interfering with vehicular or pedestrian traffic, but a permit to "conduct a rally and speeches for one and a half hours" on the courthouse steps on a weekend afternoon. *Nationalist Movement v. City of Cumming*, 913 F.2d 885, 887 (11th Cir. 1990). Although there was also to be a march to the courthouse, the parade route was along city, not county, streets, and the City of Cumming imposed no licensing fee. *See id.* at 887-90.

[10] Petitioner attempts to characterize licensing fee requirements as a "time, place, and manner" restriction, subject to a lesser standard of scrutiny than an absolute prohibition upon speech in a traditional public forum. Pet. Br. at 29. This attempt fails for three reasons.

First, imposition of a *prior* license fee cannot be seen as a limitation only upon a "manner" of a demonstration or rally. Such



"Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. at 177; *see also Boos v. Barry*, 485 U.S. 312, 381 (1988); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

The stringent standards the Court has established for restrictions on speech in traditional public fora rest on the understanding that the vitality of the First Amendment requires that there be *some* places available to each member of the public at large for the purpose of com-

---

a *prior* fee, based upon estimates by governmental personnel as to how the event is *likely* to be conducted, can preclude an event entirely, even if the event as actually conducted does not generate the costs feared. Moreover, real "manner" restrictions, such as requirements for marshals provided by the demonstrators, or prohibitions upon dangerous activities, can accomplish many of the cost- reduction goals of "user fee" ordinances without the prior-restraint aspects of the user fee approach. Such restrictions, additionally, do not create the unequal access to a constitutional right based upon economic resources inherent in user fee schemes, particularly ones with open-ended fee amounts.

Second, the general question in this case is the propriety of, and the limitations upon, license fees for First Amendment use of public property generally. If such fees are generally permissible, there is no reason to expect that the fees will not be generally imposed, leaving no free areas open for the exercise of First Amendment rights. Put another way, licensing fees of the kind here at issue are at least *no better* than total exclusions from the area covered for purposes of determining the application of "time, place, and manner" principles. Whether, under these particular circumstances or any other, such a total exclusion would be valid is not the question upon which *certiorari* was granted.

Third, user fees are in fact a *less* appropriate subject for the "time, place, and manner" standard than blanket exclusions from the relevant area. As noted, the lesser "time, place and manner" standard of scrutiny applies only when there is no content-based discrimination. The calculation of costs attributable to communicative activity on public property, however, is inherently content-based in a way that flat exclusions from limited physical areas are not.

municating with his/her fellow citizens on issues of public importance. "The very idea of a government, republican in form, implies a right of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances." *Hague v. CIO*, 307 U.S. 496, 513 (1939) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

Such locations have thus "immemorially been held in trust for the use of the public." 307 U.S. at 515. Because that use has "time out of mind" included "assembly, communicating thoughts between citizens, and discussing public questions," in those places, at least, "communication of views on national questions" is a constitutional "privilege of a citizen of the United States" and "must not, in the guise of regulation, be abridged or denied." *Id.* at 516; *see also Boos*, 485 U.S. at 321; *Frisby*, 487 U.S. at 479; *Grace*, 461 U.S. at 180.[11]

This Court's traditional public forum cases, then, teach that the use of streets, parks and similar public places for communication purposes is, *as a matter of constitutional right*, a normal and *at least coequal* use of such areas, not a privilege to be bought or earned. Such communicative uses of these traditional public fora maintain the vitality of the exchange of ideas in a democracy and are, thus, *not* purely private uses, but for the benefit of us all.

"User fee" statutes and ordinances such as the one here at issue proceed from a precisely contrary assumption—that "expressive conduct . . . is outside of—and on a lesser footing than—the 'basic mission' of [traditional public fora]." *A Quaker Action Group v. Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975). The explicit language of the For-

[11] *See generally* Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioners in *International Society for Krishna Consciousness v. Lee*, Nos. 91-155 and 91-889, at 8-12 (surveying the origins and purposes of the traditional public forum doctrine).



syth County ordinance makes this plain: that ordinance regards all parades, assemblies, and demonstrations by "private organizations and groups of private persons" as "private purposes". And the ordinance in terms regards "the costs of necessary and reasonable protection of persons participating in or observing . . . parades, assemblies [and] demonstrations" as costs that "exceed[] the usual and *normal* cost of law enforcement." Pet. App. at 100 (emphasis supplied).

Thus, "user fee" public forum ordinances are at odds with the basic principles developed not only in this Court's recent cases concerning economic burdens upon the exercise of First Amendment rights but in the traditional public forum cases as well. Simply stated, under both these lines of authority, licensing fees on communicative activity on public property designed to reimburse municipalities for police, traffic, and sanitation costs entail too great a danger of contracting the breadth of debate among citizens about controversial public issues to pass constitutional muster.

4. (a) In arguing to the contrary, petitioner relies almost entirely upon *Cox v. New Hampshire*, *supra*. And *Cox* does leave at least some room for a license fee, based upon the costs both of administering the licensing scheme itself and of "maintenance of public order in the matter licensed", as a precondition to expressive activity in what is now called a traditional public forum. *Id.* at 577.

*Cox*, however, was decided during the infancy of the relevant First American doctrine. And the single paragraph in *Cox* addressed to the user fee question does not consider *any* of the dangers to the system of freedom of expression that such fees clearly entail and that this Court's later First Amendment decisions guard against.

For example, *Cox* was decided before *Terminiello*, *supra*, the first in a long line of cases holding that speakers can-

not ordinarily be held responsible for, or censored because of, the audience's reaction to their speech. Moreover, *Cox* was also decided long before *Minneapolis Star*, *supra*, for the first time elucidated the dangers to the development of varying viewpoints posed by differential governmental fees for speech activity even where there is no motive to censor, and developed a prophylactic rule to avoid those dangers. Finally, *Cox* was decided before *Murdock*, *supra*, considered in detail the prior restraint aspects of licensing fees as a precondition for speech activity.

Thus, a strong argument can be made that *Cox's* brief discussion of the constitutionality of user fees has been eroded by time and by the developing First Amendment law. The essence of that argument is laid out at pp. 6-15 of this brief, so we do not repeat it here. At the least, for the reasons we develop below, that part of *Cox* should be read strictly and narrowly, and later clarifications of the First Amendment's scope and meaning should be given full effect.

(b) It bears noting, first, that the *only* question relating to user fees decided in *Cox* concerned a fee for a license to "engag[e] in a 'parade or procession' upon a public street," *viz*, at 571. Moreover, "the regulation with respect to parades and processions was applicable only to organized formations of persons using the highways" (*id.* at 575)—to a "march in formation" (*id.* at 574)—and "[t]he marchers interfered with the normal sidewalk travel" (*id.* at 573). The *Cox* Court took pains to emphasize that the marchers "were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting or for holding a public meeting", and that therefore "the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us." *Id.* at 578.[12]

[12] Some years later, the applicability of an identical provision to a public open-air meeting did come before this Court in *Poulos v. New Hampshire*, 345 U.S. 395 (1953). *Poulos* recognized that the *Cox* opinion upheld the licensing ordinance *only* with regard to a parade or procession, and treated the question of its validity as applied to a meeting *de novo*. 345 U.S. at 400; *see also id.* at 421 (Black, J., dissenting). And while *Poulos* upheld the licensing scheme generally as applied to public meetings, there is no indication in *Poulos* that any user fee was charged as a condition of the license, and no discussion of any fee issue whatever.



Parades on public thoroughfares such as the one giving rise to *Cox* are different from most other uses of traditional public fora for speech purposes because parades often involve the *exclusive* use of public thoroughfares, interfering directly with other, equally legitimate uses. In contrast, the kinds of costs entailed simply because crowds may gather to hear a speaker are no different from ordinary traffic control costs—assuming, as we must, given the developed public forum doctrine, that speakers and shoppers are equally entitled to use of the street. Similarly, protection from hostility or from violent attacks while using the streets for valid purposes is a "normal" cost of keeping the streets open for the citizenry generally, and cannot be fairly characterized as a cost associated only with speakers in particlular.

The user fee discussion in *Cox*, if still good law, should thus be read as sanctioning fees for "maintenance of public order" as a precondition to licenses *only* where the communicative activity involves *exclusive* use of a public location for parading or demonstrating, and then *only* with regard to costs incurred because of the need, if any, to provide alternative facilities for the others who wish to use that location as well.[13]

[13] Any such judgment regarding claims of exclusive use would have to be carefully made, with particular regard to the actual circumstances.

The demonstration in this case, for example, was to take place on the courthouse grounds on a Saturday afternoon. It is questionable, therefore, whether there were any significant competing users to disturb at that time, since the court was presumably not open. Moreover, demonstration activity on courthouse steps does not

Indeed, because under the traditional public forum doctrine the use of streets, parks and other similar public places for expressive activity is *not* subordinate to other uses, there is no basis for allocating to the speakers the *full* cost of accommodating competing users of the same space. At most, only a *pro rata* share of the cost can properly be allocated to the organization seeking to demonstrate or parade, with the remainder borne by the tax payers at large.[14]

(c) *Cox's* discussion of user fees also must be read, if it is to be preserved at all, as placing strict limits upon the amount of the fee that can be charged as a precondition to communicative activity in traditional public fora.

The statute at issue in *Cox* permitted fees only up to $300 per day. Thus, *Cox* clearly does not sanction, and this Court's later cases would not permit, an open-ended user fee statute such that approved by the Sixth Circuit in *Stonewall Union* and argued for by *amici curiae* City of Orlando, et al. here. *See* p. 10, *supra*.

*Murdock*, *supra*, decided two years after *Cox*, clarified the holding in the earlier case with regard to the amount of the fee that could be charged: The later opinion

---

necessarily interfere with those attempting to using the steps for ingress and egress. A evidenced by the press conferences that take place daily on the steps of this Court, more than three people grouped together for speech purposes can certainly be accommodated before there is any interference with entry to the building or with its internal use.

[14] This cost-allocation problem indicates, once again, why the better approach would be to conclude that the user fee aspect of *Cox* is no longer good law at all. Once it is recognized that speakers and nonspeakers are co-equal potential users of an area, it is difficult to justify charging one group directly for the costs of exclusive use, while spreading the costs of accommodating the competing users over the taxpayers as a whole. More logically, either both groups should be charged a user fee, or both should be accommodated through tax-financed expenditures.



distinguished the earlier one, *twice*, as permitting only a "nominal [fee], imposed as a regulatory measure. . . ." 319 U.S. at 116; *see also id.* at 113-14 (again referring to the tax in question as "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question."). *Murdock* explained this dual reference to "nominal" fees, briefly, by referring to a line of cases under the interstate commerce clause permitting "a fee to defray the cost of purely local regulations . . . 'so long as they do not impede the free flow of commerce. . . .'" *Id.* at 114 n.8, citing, *inter alia*, *Clyde-Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

The *Clyde-Mallory* analogy is useful in elucidating what the *Murdock* Court had in mind by the locution "nominal fee imposed as a regulatory measure," for two reasons.

First, the fee charged in *Clyde-Mallory* was analogous to the bridge and road tolls and park admission fees we referred to above (at p. 13): *Everyone* using the locality in question paid a fee, not just a subgroup of users; by spreading the costs over *all* users, the fee could indeed be kept "nominal." Second, *Clyde-Mallory* made clear that a fee that *in fact* impeded interstate commerce would *not* be constitutional. 296 U.S. at 267. Again, since engaging in speech, unlike operating boats, is not essentially economic activity, the likelihood that charging a fee will *in fact* operate to discourage protected activity is immeasurably greater. That is why, presumably, *Murdock* stated, *twice*, that only a "nominal" fee could be charged in the First Amendment context.

Thus, *Murdock* read *Cox* as permitting only those user fees "nominal" in the sense that the amount of the fee is so low as to have no real likelihood of discouraging speech activity by the class of individuals and groups affected.

As Judge Tjoflat noted in his opinion concurring in part and dissenting in part from the *en banc* Eleventh

Circuit decision, reading *Murdock* as clarifying or modifying *Cox* by limiting user fees to a "nominal" amount is sound in another respect as well. That reading tends to harmonize *Cox* with this Court's later cases recognizing that a fee for engaging in expressive activity is likely to engender content-based discrimination:

> Because of this potential for content-based discrimination, the *Murdock* Court, as a prophylactic rule, requires licensors to impose only nominal fees—even in cases in which the content neutrality of the charges has not been questioned. [934 F.2d 1482, 1491 (1991) (Tjoflat, J., concurring and dissenting).]

Under this approach, the limitation to "nominal" fees for First Amendment access provides much the same prophylactic protection against censorship as the rule against discriminatory taxation of the press adopted in *Minneapolis Star*, *supra*.[15]

[15] Judge Tjoflat went on to posit that a fee can be "nominal" not in an absolute sense, but with regard to both the actual expenditures incurred by the government and the actual resources of the license applicant. This approach to the requirement of a "nominal" fee makes sense as a matter both of diction and of policy, if fees for maintenance of public order are to be allowed at all. The comparison to actual expenditures serves an important prophylactic purpose, while the comparison to available applicant resources assures that there is no actual prior restraint.

The difficulties, for both applicants and government officials, of administering such a context-specific approach calling for a myriad of individual judgments, however, are enormous, given the need for speedy decisionmaking in First Amendment cases. And the very relativity of the standards suggested by Judge Tjoflat's approach imports into the fee setting process a degree of discretion that can facilitate content-based discrimination. These considerations, like those canvassed earlier in this brief, suggest that user fees for First Amendment activity raise sufficient censorship dangers that they should be ruled unconstitutional.

We note as well that we disagree with Judge Tjoflat's opinion insofar as it declines to strike down the statute here on its face.



In sum, even if the aspect of *Cox* permitting imposition of a license fee for First Amendment activity measured to some degree by a locality's costs in maintaining order during the activity remains viable, the ordinance prescribing such a fee should be deemed invalid unless the ordinance: (a) makes clear (or is construed so as to make clear) that the fee can be charged only if the speech activity entails *exclusive* use of a location, and then only with respects to the costs of excluding other competing users; and (b) imposes a fee "nominal" in *either* the absolute sense *or* with respect to both the applicant's resources and the government's actual expenditures. Because the Forsyth County ordinance violates both these requirements, it is facially invalid.

## CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Since the statute does not contain any limitation to "nominal" fees in any sense of the word, and or any proscription upon charges for control of onlookers or counterdemonstrators, it is facially invalid as substantially overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[redacted]

In The

# Supreme Court of the United States

October Term, 1991

---

No. 91-538

---

FORSYTH COUNTY, GEORGIA,

*Petitioner*,

vs.

THE NATIONALIST MOVEMENT,

*Respondent*.

---

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

---

## MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

---

Public Citizen respectfully moves this Court, pursuant to Rule 37.4, for leave to file a brief as *amicus curiae* in support of respondent the Nationalist Movement (the "Movement"). Consent to file this brief was granted by petitioner Forsyth County but withheld by the Movement.

Public Citizen is a non-profit, consumer advocacy organization with over 100,000 members nationwide. Public Citizen often takes controversial positions on matters of public policy, and it is concerned that if Forsyth County's fee provision is sustained by this Court, similar fees could be imposed on Public Citizen and other advocacy organizations. Imposition of such fees would

burden Public Citizen's ability to engage in express advocacy activities and to solicit contributions.

Moreover, Public Citizen, through its Litigation Group, has on occasion represented activist organizations whose messages are at odds with the views of mainstream America. These groups take positions on hotly disputed matters of public policy, ranging from environmental and energy matters to issues of social welfare and the rights of the homeless and underprivileged.

Public Citizen seeks leave to file the accompanying brief because this case threatens the ability of advocacy organizations such as Public Citizen, and the organizations it represents, to continue to use traditional public forums to bring their messages to the public, especially where that activity is intertwined with fund-raising. The Forsyth County ordinance permits the imposition of a fee of up to $1,000 for a license to hold a rally in a street or a park. If upheld, similarly high fees could be charged in connection with solicitation activities conducted by advocacy groups. The result would be intolerable. Many advocacy organizations would be hard-pressed to raise even a $100 fee for the privilege of exercising their free speech rights. Worse, if the Forsyth County fee system is upheld, other local governments will surely raise their fees as well, adding to the oppressive burdens faced by advocacy organizations.

Because respondent styles itself a "pro-majority" organization with a different view of the First Amendment than Public Citizen, Public Citizen's position would not otherwise be presented for this Court's review.



Respectfully submitted,

Leslie A. Brueckner
David C. Vladeck
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen

March 5, 1992

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES



In The
# Supreme Court of the United States
October Term, 1991

---

No. 91-538

---

FORSYTH COUNTY, GEORGIA,

*Petitioner*,

vs.

THE NATIONALIST MOVEMENT,

*Respondent*.

---

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

---

## BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

---

### INTEREST OF PUBLIC CITIZEN

The interest of Public Citizen is set forth in the foregoing motion for leave to file this brief.

### STATEMENT

This case arises out of the efforts of a group called the Nationalist Movement (the "Movement") to conduct a parade and rally in Forsyth County, Georgia. During the course of its negotiations with city and county officials over the time and place of the event, the Movement ran afoul of Forsyth County's recently

enacted parade ordinance, which permits imposition of a fee of up to $1,000 per day for each day that a parade or rally takes place. App. 28.[1] The ordinance specifically allows the amount of the fee to be "adjust[ed] . . . in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." *Id.* Thus, Forsyth County's ordinance permits imposition of a fee based on the amount of public disorder and unrest that an activity involving the communication of ideas is deemed likely to engender.

In this case, Forsyth County's Administrator "deliberately undervalued" the expenses incident to processing the Movement's application and assessed a fee of $100. Petitioner's Brief at 8-10. The Movement refused to pay the $100 fee and challenged Forsyth County's ordinance as violative of the First Amendment both on its face and as applied. App. 21-22. The district court rejected the Movement's challenge on both counts. App. 21. The *en banc* Eleventh Circuit reversed, concluding that the $1,000 fee provision was unconstitutional on its face. App. 47-48.

## SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that Forsyth County's parade ordinance, which permits imposition of a license fee of up to $1,000, violates the First Amendment. That ruling is consistent with this Court's prior decisions in *Cox v. State of New Hampshire*, 312 U.S. 569 (1941), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), which, taken together, allow such fees only to defray administrative expenses associated with policing the event *and* only if they are "nominal." Forsyth County's ordinance plainly fails this test, as it permits the imposition of a fee of up to $1,000 -- an amount which even Forsyth County does not claim is nominal.

If, however, *Cox* can be read as permitting this fee, that decision should be overruled. By imposing substantial fees based on the anticipated costs of policing an event, Forsyth County's

[1] Citations to "App." are to the Appendix to the Petition for Writ of Certiorari.



ordinance unconstitutionally levees a tax on the kind of core political speech that lies at the heart of the First Amendment.

## ARGUMENT

### THE DECISION STRIKING DOWN FORSYTH COUNTY'S FEE PROVISION SHOULD BE UPHELD AS IT IS COMPELLED BY THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The issue in this case is whether Forsyth County may impose a substantial charge for the exercise of First Amendment rights. The ordinance at issue permits imposition of a fee of up to $1,000 as a precondition for a group to engage in expressive activity in a traditional public forum. The actual amount of the charge in any given case is based on the County's prediction of the "expense incident to the administration of the Ordinance *and to the maintenance of public order in the matter licensed*." App. 28 (emphasis added). Thus, the more provocative the speech, the greater the fee. As a result, if Forsyth County has its way, free speech will no longer be "free," despite the First Amendment.

This Court has recognized that freedom of speech is "available to all, not merely to those who can pay their own way." *Murdock*, 319 U.S. at 111. Forsyth County's ordinance flies in the face of this long-standing principal by charging what amounts to a "user fee" for the First Amendment. Even worse, the ordinance is designed to impose a disproportionate burden on the type of speech that is at the core of First Amendment values -- that which "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948).

Forsyth County argues, however, that its licensing scheme is permissible under *Cox*. That case involved an ordinance that permitted imposition of a license fee for the use of public streets for parades or processions of "a sum not more than three hundred dollars." 312 U.S. at 571 n.1. The Court upheld a conviction for failure to obtain a permit against a First Amendment challenge, stating that the Constitution does not prohibit imposition of a

charge to defray the expenses incident to maintenance of the public order. *Id.* at 577. *Cox* did not address, however, whether the amount of the fee could be adjusted based on the content of the speech or the response it was likely to provoke.

*Murdock*, decided two years later, clarified *Cox*. *Murdock* involved a City ordinance requiring all persons who solicited orders for any kind of merchandise to procure a license at a specified cost ($1.50 for one day; $7.00 for one week; $12.00 for two weeks; and $20.00 for three weeks). In holding that the ordinance violated the First Amendment, the Court wrote that the permitted charge "*is not a nominal fee* imposed as a regulatory measure to defray the expenses of policing the activities in question." 319 U.S. at 113-14 (emphasis added). Later in the opinion, the Court reiterated that "*the fee is not a nominal one*, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." *Id.* at 116 (emphasis added).

Thus, *Cox* and *Murdock*, read together, stand for the proposition that license fees assessed against protected First Amendment conduct must both be directly related to administrative expenses that are required to police the event *and* be "nominal." Any other reading renders superfluous the dual references in *Murdock* to "nominal" fees. In addition, any other reading makes meaningless *Murdock*'s admonition that "[f]reedom of speech, freedom of press, freedom of religion is available to all, *not merely to those who can pay their own way*." 319 U.S. at 111 (emphasis added). Nor is there anything in either decision to suggest that a fee provision that is directly keyed to the content of the proposed speech, and to the response it is likely to provoke, is constitutionally permissible; indeed, as discussed below, this Court has repeatedly struck down such content-based restrictions as violative of the First Amendment.

It is worth emphasizing at the outset that Forsyth County's ordinance regulates speech in what has been regarded as quintessential public forums -- city streets, sidewalks, and parks. *See United States v. Grace*, 461 U.S. 171, 177 (1983). "In such places, the government's ability to permissibly restrict expressive conduct



is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Id.* at 177 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

The County urges this Court to uphold its ordinance as a legitimate, content-neutral regulation of speech. In so arguing, it ignores the fact that the ordinance imposes a disproportionate burden on one type of speech, *i.e.*, controversial speech that, in the view of Forsyth County's Administrator, is likely to invite dispute and require extra police protection. In light of this fact, it is clear that the burdens imposed by the Forsyth County ordinance are anything but content-neutral. In fact, the amount of fees charged are *directly* related to the content of the speakers' views. That being the case, the ordinance may only stand if it is "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45.

Numerous prior decisions of this Court hold that a state has no legitimate interest -- let alone a compelling one -- in suppressing provocative speech solely on the grounds that it is likely to provoke a violent reaction. For example, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1948), the Court struck down an ordinance that imposed criminal liability on "all persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace." The jury was instructed that the words "breach of the peace" included speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . .." *Id.* at 4.

In striking down the ordinance, the Court emphasized, in language particularly relevant to this case, the special importance of the type of speech targeted by the ordinance:

> The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes. Accord-

> ingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

*Id.* at 4 (citations omitted).

*Terminiello* vividly demonstrates the immense value this Court has traditionally placed on controversial speech. *Cf. Texas v. Johnson*, 491 U.S. 397 (1989). Nor is the decision an isolated one; to the contrary, this Court has announced, time and again, that states may not restrict communicative expression solely based on a fear of disruptive activity. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 519 (1972) (striking down statute making it a misdemeanor for any person, without provocation, to use "opprobrious words or abusive language tending to cause a breach of the peace"); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (striking down statute that purported to punish "mere advocacy" of use of force); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (the First Amendment "does not permit a State to make criminal the peaceful expression of unpopular views").

In this case, Forsyth County's ordinance targets precisely the type of potentially disruptive speech that *Terminiello* deemed especially worthy of protection. Although the ordinance does not contain an outright prohibition on protected speech, it can have that effect by pricing poorly-funded groups, seeking to espouse an unpopular message, out of the advocacy market. This is the classic "heckler's veto," which has consistently been struck down as violative of First Amendment freedoms. *See, e.g., Terminiello, supra*. There is no legitimate rationale for, on the one hand, striking down outright prohibitions on disruptive speech while, on



the other hand, permitting financial restrictions that effectively prohibit controversial speech from certain speakers. *Cf. Lubin v. Parish*, 415 U.S. 709 (1974) (statute that required candidates to pay filing fee in order to have their names placed on an election ballot violates rights of expression and association guaranteed by First Amendment).

In short, there is no compelling state interest that justifies an ordinance, such as the present one, which burdens speech based on its potentially disruptive effect. Ordinances of this type could easily be applied to exclude civil rights organizations, homeless advocacy coalitions, and other poorly-financed groups from engaging in any public rallies. This is not a permissible result under the First Amendment.

Forsyth County defends its ordinance by arguing that, in the present case, it "deliberately undervalued" its expenses incurred in processing the Movement's application for a permit. *See* Petitioner's Brief at 30-31. For this reason, argues petitioner, "any concern that the content of the Movement's message resulted in an enhanced fee is groundless; in fact, the Administrator and the County bent over backwards in an effort to be as fair and equitable as [the ordinance] would permit." *Id.* at 30.

This argument, however, merely underscores the sort of abuses made possible by fee provisions of this type. Not only do such provisions effectively create a heckler's veto over protected speech, they permit government officials to pick and choose among their favorite causes by adjusting the amount of the fee charged in any given case. While there is no reason to believe that favoritism was at work in this case, there is absolutely nothing that prevents Forsyth County's licensing provision from being administered in a biased fashion. This Court should not sanction a scheme that invites favoritism and abuse in realms of protected First Amendment activity. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 384 (1984) (statute that gave government officials the power to "limit discussion of controversial topics and thus to shape the agenda for public debates" condemned as "'the purest example of a "law abridging the freedom of speech, or of the press"'" (quoting *Consolidated Edison Co. v. Public Serv.*

*Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring)).

Forsyth County's "deliberate undervaluation" argument also undercuts its asserted rationale for enacting the ordinance. The County claims that its fee provision furthers the "significant government interest" of "protecting the public fisc and public order." Petitioner's Brief at 18. But the $100 fee assessed against the Movement admittedly did not even cover Forsyth County's costs in *processing* its application, let alone the expected cost of policing the Movement's demonstration and whatever counter-demonstrations the County might have anticipated (which the County did not bother to assess). Clearly, assessment of this fee, which petitioner concedes was not based on actual costs of any sort, would not protect the "public fisc" of Forsyth County in any meaningful sense.

The fee provision does, however, serve Forsyth County's financial interests in a more insidious fashion that directly infringes on the First Amendment. Petitioner admits that it enacted the ordinance "as a direct result of" two civil rights demonstrations led by Hosea Williams that, due to hostile counter-demonstrations, cost local and state government over $700,000 to police. Petitioner's Brief at 6. Even a fee of $1,000 (the maximum permitted by the ordinance) would not make a dent in a financial burden of this sort -- unless, that is, the group seeking a license was unable to pay the fee at all and thereby was prohibited from marching. Only this result would further Forsyth County's interest is protecting its public fisc. But this is precisely the result that is prohibited by the First Amendment. Under *Murdock*, only a fee that covers routine administrative expenses -- and nothing else -- is constitutionally permissible. And, if an organization is in fact impecunious, even that fee cannot stand as an obstacle to the exercise of First Amendment rights. Because Forsyth County's ordinance permits imposition of more than a nominal fee, and allows government officials to determine how much the fee should be based on the content of the proposed speech, the Eleventh Circuit's decision striking down the ordinance was entirely consistent with prior decisions in this area and should be upheld.



## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Leslie A. Brueckner
David C. Vladeck
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen

March 5, 1992

No. 91-538

(9)



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

FORSYTH COUNTY,

*Petitioner*,

—v.—

THE NATIONALIST MOVEMENT,

*Respondent*.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF GEORGIA, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENT

Eric Neisser
(*Counsel of Record*)
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5481

Steven R. Shapiro
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Elliot M. Mincberg
People for the American Way
2000 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 467-4999

Gerald Weber
ACLU of Georgia Foundation
233 Mitchell Street, SW, Suite 200
Atlanta, Georgia 30303
(404) 523-5398

No. 91-538

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FORSYTH COUNTY,

*Petitioner*,

-v.-

THE NATIONALIST MOVEMENT,

*Respondent*.

# MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF GEORGIA, AND PEOPLE FOR THE AMERICAN WAY, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.4, the American Civil Liberties Union ("ACLU"), the ACLU of Georgia, and People For the American Way ("People For"), respectfully move this Court for leave to file the attached brief *amicus curiae* in support of respondent. The parties' consent to file was requested but has been refused.

The ACLU is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the preservation of constitutional liberties. The ACLU of Georgia is one of its statewide affiliates. Since its founding over 70 years ago, the ACLU has been particularly concerned with any abridgement of First Amendment freedoms. The ACLU has appeared before this Court, as direct counsel and as *amicus curiae*, in numerous First Amendment cases. The ACLU was also direct counsel in one of the major cases on the issue of fees for parade per-

mits that are relied upon by the parties in their briefs. *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct 227 (1991). In addition, the ACLU and its state affiliates have on numerous occasions represented groups facing financial prerequisites to parade permits.

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights.

This case raises important issues involving the state's power to control access to quintessential public forums through licensing fee schemes. Those issues are of direct concern to each of the above organizations and the members they represent. Accordingly, we respectfully request leave to file the attached *amicus curiae* brief supporting affirmance of the judgment below.

Respectfully submitted,

Eric Neisser
(*Counsel of Record*)
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687

Dated: February 27, 1992



## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Other Authorities**

## INTEREST OF AMICI

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

## STATEMENT OF THE CASE

In its present posture, this case involves a facial challenge to a permit ordinance enacted in Forsyth County, Georgia. Under the terms of the ordinance, county officials may charge a fee of up to $1,000 per day for the right to hold a parade or rally on public streets. The precise fee scale is not set by statute. Instead, administrative officials are empowered to calculate the applicable fee based on their estimate of the "expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." (A. 119).[1]

The district court upheld the fee in its entirety. (A.1 -17). The Eleventh Circuit reversed, holding that the ordinance violated the First Amendment because it permitted imposition of more than a "nominal" fee and because it vested administrative officials with undue discretion to determine the size of the fee to be charged. *The Nationalist Movement v. The City of Cumming*, 913 F.2d 885, 890-91 (11th Cir. 1990), *aff'd en banc*, 934 F.2d 1482 (11th Cir. 1991).

## SUMMARY OF ARGUMENT

This Court has not reviewed a permit fee for a First Amendment demonstration since *Cox v. New Hampshire*, 312 U.S. 569 (1941). In the intervening fifty years, this Court's decisions have greatly strengthened the protection for political debate in traditional public forums.

---

[1] Appendix citations refer to the appendix to the petition for *certiorari*.

These developments are critical to a proper understanding of *Cox* and its place in modern First Amendment jurisprudence.

As local governments around the country face increasing financial burdens, pressure has grown to charge the "cost" of the First Amendment against those who seek to exercise their rights. Under this view, participating in a political rally is little different from crossing a bridge; if a user fee is valid in one context, it is valid in the other.

This misguided equation is fundamentally at odds with our constitutional heritage. The rebellion against the Stamp Act was still recent history to the framers, who fully understood that a charge for speech had the potential to stifle the system of free expression that they sought to protect by adopting the First Amendment. The framers also understood, and this Court has reaffirmed, that the exercise of First Amendment rights benefits society as a whole, and not merely those engaging in the speech.

Because of their impact on First Amendment rights, state-imposed fees that are targeted at expressive activity cannot survive the strict scrutiny that is required. A permit fee, like a permit requirement itself, is a form of prior restraint. The broad administrative discretion to set fees, which is inherent in any ordinance that seeks to estimate in advance the cost of policing a political demonstration, carries with it the risk of discriminatory application against unpopular views. In addition, a statutory scheme that charges for the cost of policing a political demonstration but not for the cost of other police services reverses the constitutional presumption in favor of speech by singling out speech for disfavored treatment. Furthermore, such fees place their heaviest burden on controversial speech and, to the extent that they consider the problem of hostile crowds, sanction a "heckler's veto." Finally, any financial hurdle, however carefully set



and narrowly focused, can effectively bar a significant segment of society -- indigent groups and unpopular causes -- from the public forum, the only channel of communication realistically within their reach.

For all these reasons, only nominal fees tied to the actual cost of processing a permit application can avoid infringing First Amendment rights, as this Court and other courts have suggested in numerous decisions. Forsyth County's ordinance, which grants a public official unguided discretion to assess substantial financial burdens for any police or administrative cost is, therefore, facially invalid.

## ARGUMENT

### I. THE IMPOSITION OF SUBSTANTIAL FEES ON THE EXERCISE OF FIRST AMENDMENT RIGHTS LIMITS POLITICAL DEBATE IN THE PUBLIC FORUM AND MUST BE SUBJECT TO STRICT JUDICIAL SCRUTINY

#### A. Permit Fees Are A Form Of Prior Restraint

Political marches on public streets and demonstrations outside public buildings are quintessential First Amendment activities in traditional public forums and as such are entitled to the strictest protection. *Boos v. Barry*, 485 U.S. 312 (1988). Permit schemes, which require advance governmental licensing of political expression, have the potential for excluding legitimate speakers from the public forum and, therefore, have long been recognized as prior restraints with "a heavy presumption against [their] constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *quoting Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). *See also Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

Parade permit fees pose the very same dangers to free expression as traditional licensing schemes and thus must also be subject to strict judicial scrutiny. A political demonstrator who cannot afford a state-imposed fee has been silenced just as effectively as a political demonstrator whose permit application is rejected by government officials for other reasons.

Where, as here, the permissible fee includes an assessment for police services, the risk of censorship increases significantly. As set forth more fully below, such schemes require subjective estimates that place "unbridled discretion in the hands of a government official or agency," *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). In addition, a fee that is calibrated to defray the cost of maintaining public order, like the ordinance challenged in this case, codifies the heckler's veto with all its censorial potential.

An unpopular group is thus doubly disadvantaged: it is more likely to produce a crowd of hostile onlookers, thus increasing the cost of obtaining a permit, and it is less likely to generate support to pay the increased fee. The net result is that unpopular groups may be frozen out of the public forum, which is the classic danger of any prior restraint.[2]

---

[2] *Amici* recognize that permit fees have sometimes been viewed as time, place, and manner regulations. *Amici* believe that characterization is incorrect. Unlike first-come-first-serve rules, security cordons, or noise limitations, permit fees do not regulate when, where or how political expression is to occur. Such fees simply place a price on otherwise protected First Amendment activity. Obviously, if the purpose of such fees were to deter First Amendment activity by increasing its cost, they would be unconstitutional for that reason alone. *See Texas v. Johnson*, 491 U.S. 397, 406-10 (1989). However, even the neutral application of permit fees (beyond the truly nominal) places a substantial burden on those who wish to express their views in a public forum and often represents an impenetrable barrier for groups with limited financial resources. *Amici* submit, therefore, that such (continued...)



### B. Permit Fees Are A Modern Version Of The "Taxes On Knowledge" That Were An Express Concern Of The Framers

This Court has noted that the history of the First Amendment is, in part, a history of rebellion against the so-called "taxes on knowledge" imposed by England "to suppress the publication of comments and criticisms objectionable to the crown . . . ." *Grosjean v. American Press Co.*, 297 U.S. 233, 246-47 (1936). As the Court explained in *Grosjean*, "the Revolution really began when in 1765 the home Government sent the stamps for newspaper duty to the American colonies." *Id.*[3] Not surprisingly, when Massachusetts passed a stamp tax on all newspapers and almanacs just two years before our Constitutional Convention, an uproar ensued, grounded in large part on the state constitution's then five-year-old protection of liberty of the press. The tax was promptly repealed. Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Geo.L.J. 257, 264 (1985).

Similarly, the Anti-Federalists argued in favor of what later became the First Amendment by observing that, without such protection, the newly formed government would be more likely to tax the means of expres-

---

[2] (...continued)
fees should be subject to the rigorous scrutiny given any direct imposition on First Amendment rights. *We* also contend that such fees cannot survive even the relaxed scrutiny afforded time, place and manner regulations because they fail to leave open alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[3] John Adams viewed the Stamp Act as "a design . . . to strip us, in a great measure, of the means of knowledge, by loading the press, the colleges, and even an almanac and a newspaper, with restraints and duties." Adams, "Our Blood-Bought Liberty," in 1 *Great Debates in American History* 36 (M. Miller ed. 1913).

sion, as England had done before the Revolution. Drawing upon the lessons of history, they wrote: "Stamp duties . . . will be a great discouragement to trade; an obstruction to useful knowledge in arts, sciences, agriculture, and manufactures and a *prevention of political information* throughout the states."[4]

The sort of "tax on knowledge" that the framers decried is no more acceptable two hundred years later because it has been reformulated as a permit fee. At the very least, such permit fees must be subject to strict judicial scrutiny.

### C. Subsequent Decisions Make Clear That *Cox v. New Hampshire* Provides Very Limited Authority To Assess Fees For First Amendment Activity

In *Cox v. New Hampshire*, 312 U.S. 569, this Court upheld against a facial challenge a state statute that authorized a parade permit fee varying from a nominal sum to $300 based upon the cost of administering the statute and maintaining public order. The Court summarily disposed of the fee issue in two paragraphs.

The broad language of the Court's brief discussion in *Cox* did not address the key issues presented here. The Court expressly noted that it did not have before it any question of discriminatory administration. *Id.* at 577. The Court also did not consider whether the state supreme court's interpretation provided sufficiently precise standards to guide police discretion or whether the cost of restraining heckling opponents could be included in the fee for "maintenance of public order." *Id.*[5] Because the statute there was challenged facially by Jehovah's Witnesses convicted for marching without even applying for a permit, the Court did not have to consider whether the amount of the permissible fee could or did exclude indigent groups from the public forum.

Development of First Amendment doctrines since 1941 relating to discretion, opposition, and indigency have made clear that *Cox* provides very limited authority to impose fees for expressive activity. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), reaffirmed First Amendment protection for concerted political action and established that monetary liability cannot be imposed "to compensate . . . for the direct consequences of non-violent, constitutionally protected activity." *Id.* at 923. The permit cases from *Shuttlesworth* to *FW/PBS* require far more precise and defined standards for administrative discretion than simply "maintenance of public order." The heckler's veto cases from *Terminiello v. Chicago*, 337 U.S. 1 (1949), to *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), have clarified that the police burden of containing opponents cannot be used to stifle the speaker. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), decided two years after *Cox*, recognized that even relatively small financial burdens could exclude some constituencies from the public forum and therefore permitted no more than nominal fees. Later equal protection cases, including the poll tax[6] and candidacy filing

---

[4] "A Son of Liberty, Objections," N.Y. Journal, Nov. 8, 1787, *reprinted in* 6 Complete Anti-Federalist 34, 36 (H. Storing ed. 1981)(emphasis added). *See also* other sources cited in Neisser, *supra* at 265-66 & nn. 41-44.

[5] The state court's only examples were "a circus parade or a celebration procession of length, each drawing crowds of observers." 312 U.S. at 577. This Court thus consciously considered only those public events in which onlookers observed, neither supporting nor opposing the event.

[6] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

fee decisions,[7] confirm the limitation first imposed by *Murdock*. As a result of these later developments, *Cox* has been read to validate only nominal fees tied to the administration of the permit system itself.

## II. A PERMIT FEE SYSTEM THAT DIRECTS GOVERNMENT OFFICIALS TO CHARGE FIRST AMENDMENT SPEAKERS FOR THE COST OF POLICE PROTECTION CANNOT SURVIVE STRICT SCRUTINY

### A. Ordinances Requiring Advance Estimation of the Cost of Police Services For Political Demonstrations Necessarily Bestow Undue Discretion Upon Government Officials

This Court has long condemned standardless discretion in First Amendment licensing schemes because it threatens the arbitrary exclusion of some voices based upon subjective preferences. *City of Lakewood*, 486 U.S. 750 (invalidating mayor's unbridled discretion in granting newspaper machine permit); *Southeastern Promotions*, 420 U.S. at 548 (striking "in the best interest of the community" standard); *Shuttlesworth*, 392 U.S. at 149 (holding unconstitutional a parade permit ordinance permitting denial because "the public welfare, peace, safety, health, decency, good order, morals or convenience [so] require"); *Kunz v. New York*, 340 U.S. 290 (1951)(invalidating an ordinance giving police commissioner unbridled discretion over granting permits to speakers). As reaffirmed recently in *FW/PBS*, 493 U.S. at 225, the unbridled discretion inherent in standardless licensing schemes is an "evil[] that will not be tolerated."

To pass constitutional muster, laws regulating expression must establish objective criteria that are "made

---

[7] *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).



explicit by textual incorporation, binding judicial or administrative construction, or well established practice." *City of Lakewood*, 486 U.S. at 770. Such specificity is typically lacking in police fee ordinances, including the one at issue here. For example, like most such schemes, the Forsyth County ordinance does not indicate whether the fees allocated to the "maintenance of public order" should be based solely upon traffic control costs generated by the participants themselves; without such specification, the fees could include police protection prompted by fear of hostile reactions by opponents. In addition, such ordinances regularly fail to explain whether the administrator is to assess all police costs, including those of officers who would normally be on duty at that time, or only overtime costs imposed by the event. Finally, such ordinances typically do not specify whether only individual police salary costs are to be assessed, or also applicable supervisory, equipment, and related overhead costs of the police department.

Even when an ordinance is expressly limited to overtime salary costs occasioned only by the conduct of the speakers, it is extremely hard to formulate precise standards for estimating in advance the amount of police services that might be required. Petitioner suggests that the recent decision in *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct 227 (1991), exemplifies appropriate standards. Quite the contrary, that decision shows the great discretion that inevitably remains even when one specifies the relevant factors.

The Sixth Circuit in *Stonewall* accepted as sufficiently definite an officer's affidavit listing the criteria normally used by his department to flesh out the ordinance's otherwise unelaborated reference to a parade's "time, date, route, length, and number of participants and vehicles." *Id.* at 1135. The officer's criteria included: the proposed and designated route; the time of day,

date, and day of week; traffic both pedestrian and vehicular (with special attention given to rerouting those normally using the area); marked and unmarked intersections and control devices already present; the estimated number of participants and viewers; the nature, composition, format and configuration of the event; the anticipated weather; and the estimated time for the event. *Id.*

Although this list of factors is more extensive than most schemes reviewed by lower courts,[8] each of the factors considered in *Stonewall* contains its own ambiguities. For example, the weather is notoriously difficult to "anticipate[]," even one day in advance. Unlike sports events, for which tickets can be sold, the expected attendance at a political demonstration on the street, planned weeks if not months in advance, will fluctuate widely. Intervening political events, as well as the amount of publicity generated both locally and in cities from which participants might come, are two of the major variables. Most seriously, allowing government officials to consider the "nature, composition, format and configuration" of an event, *id.*, would allow administrators to consider the group's message and character. It would thus reintroduce the same value-laden judgments that neutral criteria are ostensibly designed to eliminate.[9]

Consideration of such factors, which *Stonewall* deemed a constitutional safety net, is less likely to lead to evenhanded application than to either of two constitutionally impermissible results. On the one hand, the

[8] *See, e.g., Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281 (D.Md. 1988); *Invisible Empire of the Knights of the Ku Klux Klan v. City of West Haven*, 600 F.Supp. 1427 (D.Conn. 1985).

[9] In *Stonewall* itself, the Sixth Circuit remanded to determine whether the fee criteria had been discriminatorily applied against unpopular causes. 931 F.2d at 1137-39.



police could undertake an extensive and intrusive analysis of an organization's point of view, past conduct, and current support. This would both impinge on the privacy of political association long protected by this Court, *NAACP v. Alabama*, 357 U.S. 449 (1958), and threaten extensive delays in issuance of the permit. *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984). The other possibility is that the police will undertake no real investigation at all and either overestimate the fee because they are unsure as to the degree of conflict and controversy likely to be raised by the speaker's viewpoint, or charge more predicated simply on the personal bias of the administrator.[10]

As this Court has observed, "the use of shifting criteria [is] far too easy for the licensor discriminating against disfavored speech, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood*, 486 U.S. at 758. In this case, even these "shifting criteria" are absent from the Forsyth County ordinance, further magnifying the problems of administrative discretion.

### B. Police Service Fees Discriminate On the Basis of Content, Particularly When They Include the Cost of Controlling Hostile Onlookers

Fee ordinances that include the cost of police services pose more than merely drafting difficulties. Quite apart from the discriminatory potential grounded in the

[10] Some have suggested that a refund provision would cure many of the dangers posed by advance estimation. But provision for a refund only confirms the assumption in text that police will err on the side of overestimating the risks of an event. Moreover, as noted below, overestimated advance fees could bar many from ever holding the event; for those groups, the refund provision is meaningless.

broad discretion to estimate in advance the need for police services, there is substantial, impermissible content discrimination inherent in any police fee.

First, organized political action, the epitome of First Amendment activity, is the specific target of such laws. Earlier this Term, the Court reaffirmed that forfeiture of even a convicted criminal's money is impermissible under a statute that singles out only the profits from protected First Amendment activity. *Simon & Schuster v. Members of The New York State Crime Victims Board*, __ U.S. __, 112 S.Ct. 501 (1991). The Forsyth County ordinance, and others like it, suffer the same constitutional infirmity. Criminals are not asked to pay for the cost of their arrests, people in car accidents are not asked to foot the officer's bill, pedestrians and vehicles are not charged for traffic control at rush hour. Only those engaged in organized public association to bring about political change, long recognized as protected First Amendment activity, *Bates v. Little Rock*, 361 U.S. 516 (1960), are burdened with fees.[11]

In addition, police fees inevitably discriminate among public political associations by penalizing those addressing the most current and controversial issues. Fees limited to traffic control costs most heavily burden the speaker whose topic generates the greatest support. Fees that include the cost of controlling opponents charge most to those whose topic generates the most virulent opposition. One need only consider the many occasions when both sides of the abortion debate come out to confront each other to realize that either approach to police fees will burden the same kind of speaker -- one addressing the most controversial subjects of the day, the subjects in greatest need of First Amendment protection.

Charging the speaker with the cost of controlling counterdemonstrators also creates the risk of a heckler's veto. As this Court has often noted, political speech is intended to invite opposition and often creates dissent and anger. Indeed, this Court has observed that free speech may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello*, 337 U.S. at 4.[12] It is therefore no surprise that political speech often attracts boisterous, even violent counterdemonstrators.[13] Acknowledging that purpose, this Court has repeatedly rejected restrictions on First Amendment speech based on the fear of violence or disruption by hostile onlookers.[14]

---

[11] *Amicus Curiae* City of Orlando claims that there is no government obligation to subsidize the exercise of First Amendment rights. *Amicus* Brief at 10-12. This argument is wholly off point. As noted above, government subsidizes all other users of police service, and seeks reimbursement only from those exercising free speech rights. Even among First Amendment users of police services, cities and counties frequently choose to absorb the cost of certain events, such as Fourth of July parades and presidential motorcades. *See Stonewall*, 931 F.2d at 1138-39. Police fee ordinances thus single out First Amendment activity in general and nonmainstream demonstrations in particular.

For similar reasons, the analogy drawn in petitioner's brief to commercial user fees is inapposite. Pet.Br. at 38-41. Unlike commercial activity, public expression is a fundamental right subject to strict scrutiny. Moreover, airport user fees are charged to all customers uniformly, while police service fees burden only expressive users of those services.

[12] *Boos v. Barry* reaffirmed that an audience's emotional response is a "primary impact" of expression. 485 U.S. at 321. Any regulation of that effect is subject to strict scrutiny. *Id.*

[13] *Cf. Dunlap v. City of Chicago*, 435 F.Supp. 1295 (N.D.Ill. 1977)(a small march sponsored by Dr. Martin Luther King was disrupted when a hostile crowd hurled rocks, bottles, bricks and explosives at the marchers, severely injuring many of them).

[14] *Coates*, 402 U.S. 611 (ordinance prohibiting "conduct annoying to persons passing by" facially violative of the right to free assembly and association); *Bachellar v. Maryland*, 397 U.S. 564 (1970)(disorderly (continued...)

The most predictable result of a rule assessing the speaker for the cost of controlling hostile onlookers would be to silence the speaker.[15] Furthermore, the likelihood of that result will only encourage counterdemonstrators to escalate their threats of violence. The greater their threatened unlawfulness, the greater the cost to the speaker, and the less likely it is that the speech will ever take place. Such a policy cannot be tolerated if we are to retain the First Amendment as "one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello*, 337 U.S. at 4.

Recognizing that fees based on the cost of protecting the speaker against counterdemonstrators creates a heckler's veto, lower courts have uniformly rejected permit fees and other financial conditions that are based in part on such considerations.[16] This Court should likewise con-

---

[14] (...continued)
conduct conviction voided because charge permitted conviction for "saying that which offends, disturbs" based on evidence that some onlookers were angry or resentful); *Gregory v. Chicago*, 394 U.S. 111 (1969)(police anticipated unruly conduct of bystanders; arrests violated right of peaceful assembly); *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966)("[p]articipants in an orderly demonstration in a public place are not chargeable with the danger . . . that their critics might react with disorder or violence"); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (arrests of peaceful protestors following expression of discontent by onlookers infringed rights of free speech and assembly); *Terminiello v. Chicago*, 337 U.S. 1 (speaker's breach of the peace conviction based on violent reaction of opponents is unconstitutional).

[15] Such costs can be substantial. In Forsyth County, for example, the civil rights leader Hosea Williams led a march in 1987 which was met by 1,200 violent counterdemonstrators. The total state and local police costs were said to exceed $670,000. (A.95). The county points to this episode and its unusually high cost as justification for its ordinance. In fact, just the opposite is true. The higher the cost, the more inequitable it is to assess it entirely against an innocent speaker whose only "offense" is to hold unpopular views.

[16] *See Central Florida Nuclear Freeze Campaign*, 774 F.2d at 1518-
(continued...)



firm that lawful First Amendment activity simply cannot be burdened with a requirement to pay for the potentially violent reactions of those who disagree with the speaker.

## III. THE IMPOSITION OF SUBSTANTIAL FEES FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS SERIOUSLY IMPERILS THE RIGHT OF THE POOR, AS WELL AS NEW AND CONTROVERSIAL GROUPS, TO EXPRESS THEIR POLITICAL VIEWS IN TRADITIONAL PUBLIC FORUMS

### A. Substantial Fees Pose A Serious Obstacle To First Amendment Activity By Poorly Financed Groups

"Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." *Murdock*, 319 U.S. at 111. An ordinance that outright forbade the poor to exercise their First Amendment right to speak would clearly not withstand an attack under the dual aegis of Equal Protection and the First Amendment. An ordinance charging fees that are not nominal -- fees reflecting the cost of policing an event, rerouting traffic, containing opponents, or processing an application -- will likewise exclude would-be demonstrators who are poorly financed from those forums that have traditionally been available to even the most marginal in society. *Cox* simply does

---

[16] (...continued)
21; *Collin v. Smith*, 578 F.2d 1197, 1208-09 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754-55 (7th Cir. 1972); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F.Supp. at 285-86; *Invisible Empire of the Knights of the Ku Klux Klan v. City of West Haven*, 600 F.Supp at 1433-35; *Houston Peace Coalition v. Houston City Council*, 310 F.Supp. 457, 461-63 (S.D.Tex. 1970).

not address this problem.

A fee so substantial that it prohibits individuals and groups from exercising their First Amendment rights constitutes a prior restraint. In *Murdock* this Court expressed deep concern that, by charging substantial amounts, a state "can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy." 319 U.S. at 112. The Court vigorously condemned any fee "levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment," because "it restrains *in advance* Constitutional liberties of press and religion and inevitably tends to suppress their exercise." *Id.* at 113-14 (emphasis in original). As this Court reaffirmed just two years ago, "a primary vice of the ordinances at issue [in *Murdock* and *Follett v. McCormick*, 321 U.S. 573 (1944)] was that they operated as prior restraints of constitutionally protected conduct." *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 387 (1990).

This Court has on several occasions after *Murdock* struck down fees that prohibited those of limited means from exercising their fundamental rights to participate in the political process. In *Harper v. Virginia Board of Elections*, 383 U.S. 663, this Court rejected a poll tax of $1.50 as impermissibly discriminatory. In *Bullock v. Carter*, 405 U.S. 134, this Court struck down a fee system that excluded legitimate and nonfrivolous candidates because of their inability to pay. Chief Justice Burger explained that "we would ignore reality were we not to recognize that this system falls with unequal weight on [those exercising their political rights] according to their economic status." *Id.* at 144. In *Lubin v. Panish*, 415 U.S. 709, a statute that created a moderate, but still effectively exclusionary fee of $701 was voided because of the burden



it placed on associational and voting rights.[17]

Under any system charging nonnominal fees, numerous groups would be denied their rights to speech and equal protection under the law: groups of poor people presenting a grievance; groups with an unpopular message who never can raise much money; and groups that were recently formed to address new developments and have had no time to do fundraising. For many of these marginal groups, which operate close to the bone, a permit fee, even if not literally exceeding their total budget, would drastically cut into monies meant to be used to make their expression effective, *e.g.*, publicity, flyers, and posters. *See, e.g., Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1052-53 (2d Cir. 1983).[18]

Placing the substantial cost of free speech on the speaker seriously undermines the goals of the First Amendment. Most importantly, "it is only through free debate and free exchanges of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello*, 337 U.S. at 4. Ordinances that exclude groups because of inability to pay

---

[17] *See also Dixon v. Maryland State Administration Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989)(striking down $150 filing fee for ballot access).

[18] It is instructive to note the sorts of groups that have felt forced by the exclusionary effect of permit fees to challenge them in court, including: the Nationalist Movement in this case; gay rights advocates, *Stonewall*; antinuclear activists, *Central Florida Nuclear Freeze Campaign*; small citizen action groups, *Eastern Connecticut Citizen's Action Group*; minority religions, *Int'l Society for Krishna Consciousness of Houston, Inc. v. City of Houston*, 689 F.2d 541 (5th Cir. 1982), *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), *Murdock*, and *Follett*; and minor political parties, *U.S. Labor Party v. Codd*, 391 F.Supp. 920 (E.D.N.Y. 1975). *See also* Balkin, "Some Realism About Pluralism: Legal Realist Approaches to The First Amendment," 1990 Duke L.J. 375, 398 (identifying groups most burdened by purportedly content-neutral regulations).

eliminate the voices of the poor from public debate, and thus prevent the government from hearing and responding to the will of all the people. Such laws also close off the First Amendment's "safety valve" for the angry, frustrated segments of society.

Ordinances that charge demonstrators substantial and ultimately prohibitive fees ignore these externalities. Although the financial cost of a demonstration may be more immediate, the cost of diminishing the range of debate are no less real. The benefits of free expression accrue to the people generally, not merely to those exercising the right. In *Bullock*, the Court recognized the state's desire to conserve funds, but rejected the state's plea that the fee scheme was necessary to prevent the taxpayers from having to pay for the primary system. For similar reasons, the sort of political speech at issue in this case is not such "a lesser part of the democratic process that its cost must be shifted away from the taxpayers generally." 405 U.S. at 148-49.

A nonnominal fee system fails even if the Court were to use only a "time, place, and manner" analysis because of the absence of ample alternative channels of communication. There is simply no adequate substitute for the "streets and parks . . . immemorially . . . held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In striking down the statute in *Lubin v. Panish*, this Court explained that "absent a reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." 415 U.S. at 718.[19]

[19] *Kaplan v. County of Los Angeles*, 894 F.2d 1076 (9th Cir. 1990), relied on by petitioner, is distinguishable on precisely this point. There the court upheld a requirement that candidates pay for inclusion of (continued...)



The groups that would be barred from these public forums have no means other than traditional public protest to deliver their message and to communicate how widely shared their grievance is. They cannot purchase a full-page ad in a national newspaper or get an appearance on the *MacNeil/Lehrer Newshour*. Even distributing leaflets may not be within the financial grasp of some. For them it is the streets or nothing.

### B. Only Nominal Fees Tied To The Actual Cost Of Processing A Permit Application Are Constitutional

As this Court has made clear since *Murdock*, great care must be taken before charging anything for free speech. Assessments for police services are impermissible for the reasons discussed above. Yet, even a fee utterly devoid of police cost can pose the risk of excluding legitimate speakers from the public forum.

As a result, to be constitutional, a permit fee must be sharply limited both in purpose and in amount. It may not include any cost other than those literally imposed upon the government by processing the permit application -- filing, reproduction, and mailing costs. This limit will eliminate all the discretion needed to estimate the far more variable and speculative police costs, and will avoid the tax on planned association and the heckler's veto implicit in any police service fee. The permit fee must also be very small in absolute terms -- "nominal" to use *Murdock*'s expression -- to insure that all speakers, regardless of their wealth, can participate in the public forum.

[19] (...continued)
their statements in a ballot pamphlet distributed to voters by the government. Failure to pay for the statement did not remove the candidate from the ballot or deny her the opportunity to communicate with voters by street rallies, pamphlets, or mailings of her own.

When an ordinance imposes substantial fees for free speech, an indigency exception, *i.e.*, one that exempts only those who have virtually no money whatsoever, is not necessarily a cure. Affordability is relative. A group or individual may have some funds, but these assets may be inadequate to pay both the normal cost of a demonstration and the permit fee. In *Murdock*, this Court noted that, while an itinerant preacher might be able to afford one fee, encountering a series of fees when travelling from town to town would create an insuperable barrier between the preacher and his First Amendment rights. 319 U.S. at 115. *Eastern Connecticut Citizens Action Group* is another case in point; though not insolvent, the group there would have had tremendous difficulty in paying the fee of $200 and the insurance cost of $780 with its budget of $9,500 that already included a deficit of $4,600. 723 F.2d at 1052-53. As this Court explained in *Lubin*, the question is whether a fee "unfairly or unnecessarily burden[s]" the First Amendment speaker. 415 U.S. at 716.

The concurrence in the *en banc* decision below recognized that affordability means different things to different people, and suggested that what is "nominal" should be determined in relation to the assets of each group. 934 F.2d at 1491-92. While appealing in theory, such a formula could prove very difficult to administer. How does one determine what a group's assets are? If it is incorporated, as here, one can review its balance sheet. But if it is an informal group of individuals, what should one consider? How is one to deal with the hundreds or thousands of individuals who will join the demonstration at the last minute, but are not identifiable in advance? What if there were one nonindigent member of a group; would that person have to shoulder the entire demonstration cost if the group is to march? An ordinance could not presume that all of the personal resources of a member are available to the group without placing an extraordinary burden on the right of political



association.

Clearly, then, any affordability test limited to the *available assets* (*i.e.*, the funds collected less those already budgeted for other expenditures) of the *group* would be quite complex. The computation could prove time consuming, which is a problem for any organization that seeks to respond to fast-breaking political developments. *See NAACP v. City of Richmond*, 743 F.2d 1346. Moreover, the intrusiveness of the inquiries necessary to make an accurate assessment could create separate constitutional problems. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. at 462. *See also Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

A system that charges a flat fee that is nominal to nearly all individuals or groups would, however, avoid each of the problems associated with an affordability test. Clearly, an ordinance cannot exact a pound of flesh for the exercise of free speech. It must also be administratively practical. A flat, nominal fee would accomplish these two ends. Because some people, however, can truly pay nothing, an indigency exception would be still be necessary, as this Court recognized in finding that some could not afford even a $1.50 poll tax. *See Harper*, 383 U.S. 663.[20]

---

[20] For scholarly analysis of the issues posed by financial conditions to parade permits, *see* Rice, "The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities," 63 Notre Dame L.Rev. 561, 576-86 (1988); Stone, "Content-Neutral Restrictions," 54 U.Chi.L. Rev. 46, 84-85 (1987); Neisser, *supra*; Goldberger, "A Reconsideration of *Cox v. New Hampshire*: Can All Demonstrators Be Required to Pay the Cost of Using America's Public Forums?" 62 Tex.L.Rev. 403 (1983).

## IV. FORSYTH COUNTY ORDINANCE NO. 34 IS FACIALLY INVALID BECAUSE IT CREATES UNGUIDED ADMINISTRATIVE DISCRETION, PERMITS IMPOSITION OF A HECKLER'S VETO, AND THREATENS TO EXCLUDE POORLY FINANCED CAUSES FROM THE PUBLIC FORUM

Forsyth County Ordinance No. 34 contains all the fatal defects outlined above. Section 3(6) of the ordinance provides as follows:

> Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.

(A.119).

The ordinance is unconstitutional because it bestows standardless discretion on county officials, allows imposition of a heckler's veto to defeat protected First Amendment speech, and authorizes substantial fees that exclude poorly financed groups.

### A. The Ordinance Bestows Standardless Discretion Upon County Officials to Determine Who Has Access to the Public Forum

Forsyth County Ordinance No. 34 allows fees to be assessed for the exercise of protected political speech.



The fees may range from 0 to $1,000.[21] The only language guiding the calculation of a fee provides that the fee shall "meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." *Id.* The phrase "expense incident to the administration of the Ordinance" clearly refers to the cost of processing the permit application, *e.g.*, copying. Such a fee could readily be determined and imposed in a standardized manner.

The phrase "maintenance of public order," however, is less clear. The provision gives no guidance on virtually any issue that the administrator would face: whether she should consider solely traffic-related problems, or whether the fee may also reflect the cost of controlling the opposition; whether to assess all police costs, including those for officers already assigned to duty, or only those overtime costs specially incurred because of the event; whether to include supervisory, equipment and overhead costs, or only salary expenses. Unlike *Stonewall*, there is not even an informal codification of the relevant factors. The permitted range of the fee combined with the total lack of criteria for determining how the fee should be calculated strongly suggest that the determination may vary with the subjective views of a county official. As this Court has repeatedly held, an ordinance lacking clear standards to ensure objective and evenhanded enforcement is unconstitutional.[22]

---

[21] The $1,000 "cap" is rendered meaningless, however, by Section 7(c) of the ordinance. In addition to the possible fee of $1,000, applicants may incur additional costs in furnishing "special and extraordinary items," such as trash cleanup, first aid, and parking for cars. (A.120). As with the fee calculation, the ordinance provides no standards to determine when these "items" are needed beyond the "opinion of the Administrator." *Id.*

[22] The unconstitutional absence of standards is highlighted by the provisions in Sections 7(c) and (e) allowing denial of a permit based on

(continued...)

Compounding the lack of standards in the fee section itself is a separate provision that requires an applicant to supply "[a]ny additional information which the Administrator may find reasonably necessary to the fair administration of this Ordinance." Section 3(2)(f). (A.104). There is no guiding language regarding what sort of information is relevant to the "fair administration" of the ordinance.[23] Thus, there is unbounded discretion to demand information about undetermined factors. One certain result of such free-wheeling authority would be intrusion on the privacy of association of the kind previously found to be unconstitutional by this Court. *NAACP v. Alabama*; *Brown v. Socialist Workers '74 Campaign Committee*.

Finally, the lack of standards in the ordinance is aggravated by the absence of a provision for prompt judicial review. The ordinance only refers to a possible appeal to the Board of Commissioners. Section 7(e). (A. 121-22). This Court's recent decision in *FW/PBS* reaffirms that provision for prompt judicial review is essential to the constitutionality of any prior restraint permit scheme. Here the absence is particularly devastating, as

---

[22] (...continued)
"unreasonable interference with the public welfare, peace, safety, health, good order, and convenience of the general public." (A.107, 121-22). This language almost precisely mirrors the language of the licensing ordinance found unconstitutional by this Court in *Shuttlesworth* 27 years ago: "public welfare, peace, safety, health, decency, good order, morals or convenience." 394 U.S. at 149.

[23] The only language explaining the kind of "additional information" that may be required calls for a "complete record of all arrests and convictions against the applicant." (A.104). This raises the specter of discrimination based on such information, contrary to the well-established principle that "[p]ersons with prior criminal records are not First Amendment outcasts." *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F.Supp. 592, 598 (N.D.Tex. 1984), *citing Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).



the administrative discretion is wholly unfettered by the ordinance itself and only judicial review would hold out any hope for objective administration.

### B. Ordinance No. 34 Is Facially Invalid Because It Allows A Heckler's Veto To Silence Speakers And Imposes Other Content Discrimination

Time and again the heckler's veto has been struck down by this Court. *See* pp.13-15, *supra*. Concern for the conduct of counterdemonstrators simply cannot be used to silence a speaker. Despite this, the Forsyth County ordinance directs the administrator to assess fees based on the "maintenance of public order." This clearly allows the speaker to be charged for the conduct of his opponent, thereby creating a heckler's veto.

Indeed, Ordinance No. 34 was tailored to address the financial burdens created by counterdemonstrators. Prior to the Hosea Williams march on January 24, 1987, *see* n.15, *supra*, Forsyth County was without an ordinance. Yet within three days of the march, the County Board of Commissioners enacted Ordinance No. 34 to help mitigate police costs in the future. (A.98-111). Advised that the ordinance created a heckler's veto, the Board subsequently amended the ordinance by purporting to set a ceiling of $1,000 on permit applications. (A. 118-20). However, in addition to the extra costs that could bring the fee charged well over $1,000, *see* n.21, *supra*, the ordinance allows the opposition to be considered in assessing the fee against the speaker. Accordingly, Ordinance No. 34 must be struck down.

The ordinance possesses additional content discrimination flaws. First, only events on public roadways are charged for the cost of police services. Those involved in crimes or accidents, for example, are assessed nothing. Organized, public political events, the very core of our system of free expression, are impermissibly targeted.

Moreover, the ordinance imposes the greatest cost

on the most controversial public events. Current, controversial issues draw the largest audiences. Under the ordinance, such rallies would be charged the highest fees even if only traffic control costs were considered. Such a scheme strikes at the core of the First Amendment, which above all protects debate regarding issues of great civic importance. The ordinance cannot, therefore, be sustained.

### C. The Ordinance is Facially Invalid under the First and Fourteenth Amendments Because It Authorizes Substantial Fees That Will Preclude Many From the Public Forum

Forsyth County has created a permit system that charges fees substantial enough to prevent the poor from exercising free speech. Whether viewed as a prior restraint, a denial of equal protection, or a time, place, and manner regulation, this system cannot withstand scrutiny.

The county can no more charge fees that bar groups from protesting in a public forum than it could impose exclusionary fees for ballot access. As noted above, in *Harper*, *Bullock*, and *Lubin* this Court invalidated fees that placed undue burdens on poor voters and candidates and restrained them from full participation in the democratic process. The Court recognized taxpayer relief as a legitimate government interest, but held it an insufficient basis to impinge on the democratic process. The ability to join public debate on issues of civic importance is no less a part of the democratic process than the ability to run as a candidate or to vote. Here, a $100 fee was too high for the Nationalist Movement, which had total assets of only $90 and liabilities of $1,600,[24] and

[24] The Financial Statement of the Nationalist Movement, dated January 6, 1989, two weeks before the scheduled march, is attached to respondent's Application to Proceed *In Forma Pauperis* in this case, dated January 18, 1989.



prevented them from protesting. Without doubt, charging fees up to $1,000 will exclude numerous groups who are unable rather than unwilling to pay the cost of delivering their message. Such a prior restraint, which impinges on a fundamental right because of poverty, is not allowed.

Under a time, place, and manner analysis, the ordinance is invalid for failing to provide "ample alternative channels of communication." The ordinance allows fees to be levied for all "public property and public roads" -- the entire range of traditional public forums. Section 2. (A.103). There is no acceptable substitute for demonstrating in public forums; if excluded from this channel of communication, there is effectively no other. Fifty dollars could not purchase more than a few hundred fliers, and certainly could not buy the press coverage that a march would generate. Similar to other poorly financed groups, respondent was relegated to rallying as the only effective means of communication.[25]

The indigency exemption does not save the ordinance. To qualify for that exemption, *each* individual in the group must file a "pauper's affidavit."[26] As shown above, this is impracticable when viewed against the re-

[25] As petitioner has pointed out, Pet.Br. at 28-29, respondent could have marched on the streets of the City of Cumming, which did not have a fee ordinance. This fact, however, should be irrelevant to the Court's resolution of the case. Forsyth County, which restricted all public roads under its jurisdiction, cannot rely on the lenience of a neighboring jurisdiction to supply respondent with ample alternative channels of communication. "One is not to have the exercise of this liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

[26] "[I]ndividuals may be excused from such a deposit on account of indigence upon the execution under oath, by *each individual* in the group applying for the permit, of a pauper's affidavit." Section 3(7) (emphasis added). (A.119).

ality of large numbers of people potentially involved in demonstrations. Moreover, the transaction cost of gathering affidavits from all those to be involved will be substantial. The personnel, postage, and transportation costs are by definition out of the reach of the indigent. In addition, the indigency exemption is defective because its requirement of a financial statement from each participant presumes that all of the personal assets of any individual member are at the disposal of the group as a whole.

The ordinance not only disregards the distinction between individual and group assets, but completely ignores indigent incorporated groups.[27] This Court has found that the corporate identity of a speaker does not deprive its speech of First Amendment protection. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Nationalist Movement, as a corporation, filed an indigency affidavit, which showed assets totalling less than the required fee. No exception was made for the group and they were restrained from marching. Had they been merely an unincorporated association, they presumably could have had the fee waived.

In sum, the ordinance challenged in this case erects a series of obstacles in the path of individuals and groups seeking to exercise their First Amendment rights in Forsyth County. Those obstacles are inconsistent with decisions since *Cox v. New Hampshire*. They are also inconsistent with the meaning and purpose of the First Amendment.

---

[27] "If the private organization be other than individuals, a permit *will not issue* without the paying of the necessary fee." Section 3(7)(emphasis added). (A.119).



## CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

Eric Neisser
(*Counsel of Record*)
Constitutional Litigation Clinic
15 Washington Street
Newark, NJ 07102
(201) 648-5481

Steven R. Shapiro
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Gerald Weber
ACLU of Georgia Foundation
233 Mitchell Street, SW
Suite 200
Atlanta, Georgia 30303
(404) 523-5398

Elliot M. Mincberg
People for the American Way
2000 M Street, NW
Suite 400
Washington, D.C. 20036
(202) 467-4999

Dated: March 4, 1992